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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 73

NEW YORK CENTRAL RAILROAD COMPANY,
PETITIONER,

vs.

ANTONIA AMBROSE, AS ADMINISTRATRIX OF THE ESTATE OF JOHN AMBROSE, DECEASED

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HUDSON COUNTY, STATE OF NEW JERSEY

PETITION FOR CERTIORARI FILED APRIL 29, 1929

CERTIORARI GRANTED MAY 27, 1929

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IN CIRCUIT COURT OF HUDSON COUNTY

Action at Law

ANTONIA AMBROSE, Administratrix of the Estate of John Ambrose, Sr., Deceased, Plaintiff,

v.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Defendant

COMPLAINT—Filed August 9, 1927

Plaintiff residing at No. 112 13th Street, West New York, in the County of Hudson and State of New Jersey, says that:

1. She is administratrix of the Estate of John Ambrose, Sr., deceased, and brings into court letters of administration granted to her upon the said estate by the Surrogate of the County of Hudson.

2. Defendant is now and was at all times hereinafter mentioned, a corporation of the State of New York, engaged in interstate commerce as a common carrier by railroad, at Weehawken, in the County of Hudson.

3. Intestate of the plaintiff, on the 16th day of July, 1927, was employed by the defendant in said interstate commerce.

[fol. 2] 4. Intestate of the plaintiff, on the 16th day of July, 1927, at Weehawken aforesaid, was killed through the negligence of the defendant.

5. The negligence of the defendant consisted in this: While intestate of the plaintiff was in the grain elevator of the defendant company on Pier 7 at Weehawken, engaged in the interstate commerce of the defendant, the defendant failed to use reasonable care to provide the intestate of the plaintiff with a safe place in which to work, but on the contrary, negligently and carelessly, and without warning or notice to the intestate of the plaintiff, used certain poison-

ous gases or chemicals in the said grain elevator where intestate of plaintiff was at work, and by reason thereof he was overcome by said poisonous gases and chemicals and was caused to fall into a shaft and was killed.

6. The intestate of plaintiff was at all times in the exercise of due care for his safety.

7. Intestate of plaintiff left him surviving, his widow, the plaintiff herein, age 57 years, a son, Joseph Ambrose, age 34; a son, John Ambrose, Jr., age 25 years; a daughter, Minnie Sherman, age 21 years and a son, William Ambrose, age 18 years, who have suffered pecuniary injury by reason of his death.

8. The within action is commenced within twenty-four calendar months after date of death of plaintiff's intestate.

Plaintiff demands $25,000.

Alex. Simpson, Attorney for Plaintiff.

[fol. 3] In Circuit Court of Hudson County

[Title omitted]

Answer—Filed August 27, 1927

The defendant, New York Central Railroad Company, a body corporate of the State of New York having its principle place of business in the City of New York, answering complaint herein says that:

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1.

2. It admits paragraph 2.

3. It denies paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5, and says that it is not guilty of any of the negligence set out in the complaint.

6. It denies paragraph 6.

7. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 7.

[fol. 4] Second Defense

Any injuries sustained by plaintiff's intestate, were occasioned by his negligent conduct in going to the place where said injuries were received in violation of defendant's orders, and when to the knowledge of plaintiff's intestate it was obviously dangerous so to do.

Wall, Haight, Carey & Hartpence, Defendant's Attorneys.

In Circuit Court of Hudson County

Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., Deceased,

v.

New York Central Railroad Company

Before Hon. Frank L. Cleary, J., and a Jury

Case

Jersey City, N. J., May 10, 1928.

Appearances of Counsel

Alexander Simpson, Esq., for the Plaintiff.
Wall, Haight, Carey & Hartpence, Esqrs., for the Defendant, by William H. Carey, Esq.

A jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the jury.

Mr. Simpson: I offer the Letters of Administration [fol. 5] granted on July 21st, 1927, on the estate of John Ambrose, deceased, to Antonia Ambrose by the Surrogate of the County of Hudson.

Mr. Carey: General administration.

Mr. Simpson: General administration.

(Accepted and marked as Plaintiff's Exhibit P-1 of this date.)

WILLIAM JOSEPH DILLWORTH sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?
A. West New York.
Q. What is your employment?
A. Foreman of the bin floor, West Shore grain elevator.
Q. Were you employed in the grain elevator located at Weehawken under the control and operation of the New York Central Railroad?
A. Yes, sir.
Q. How long have you been so employed?
A. About eight years.
Q. What is your position there?
A. Foreman.
Q. What is the work that is done in that elevator?
A. Just on the floor where I work?
Q. In the elevator, the building, what is it used for; what do you do with it?
A. Handling of grain.
Q. Grain that comes in railroad cars and goes out?
A. Yes, sir.
Q. Who is in general charge of the grain elevator, or was?
A. Mr. Shanahan.
Q. What is his position?
A. Superintendent.
Q. Of the grain elevator?
A. Yes, sir.
Q. Did you know John Ambrose in his lifetime?
A. Yes, sir.
Q. Was he employed in this grain elevator?
A. Yes, sir.
[fol. 6] Q. What was the date that this accident happened?
A. July 16th, 1927.
Q. What day of the week was it?
A. Saturday.
Q. Before the accident to Ambrose, how long had he worked in that elevator?
A. Well, to my knowledge, about six or seven years.
Q. He was there thirty years, wasn't he?
A. He was laid off there for a time.

Q. Was he there when you came to work there?
A. Yes, sir.
Q. What general work was he doing besides sweeping up the floor of the elevator?
A. Helping to set trolleys.
Q. What are trolleys?
A. Shoots for putting the grain in the bins.
Q. Where did the grain come from?
A. From the scale floor.
Q. He would sweep up, and he would put these shoots, you say, into the bin?
A. Set them in the holes.
Q. Set them in the hole of the bin?
A. Yes, sir.
Q. And this grain would go through these spo-ts; is that right?
A. Yes, sir.
Q. Did he do anything else besides work at sweeping up and putting shoots into the bin?
A. There was times he would have to go down some of these bins, when there would be grain stuck in. There was times he would have to go into the bins to sweep them out, clean them out. That was what his job was; that was his work.
Q. Describe the bin?
A. It is a storage bin where they store grain.

Mr. Carey: Do you want to look at photographs of the bin?
Mr. Simpson: Thank you.

[fol. 7] Q. Is this picture a picture of the interior of the bin as you would look down?
A. Yes, sir; there is the hole on the bottom.

Mr. Carey: Would you speak a little louder.
The Witness: That is where they let the grain out.

Q. Where does it go into the bin; does it go through this bin?
A. Yes, sir.

Mr. Simpson: I offer this and ask to have it marked.

(Accepted and marked as Plaintiff's Exhibit P-2 of this date.)

Q. And what is this photograph?
A. The level of the floor.

Mr. Simpson: I will have that marked.

(Accepted and marked as Plaintiff's Exhibit P-3 of this date.)

Q. That is where the grain would go into the bin?
A. Yes, sir.
Q. Where would be the opening where you would go into the bin?
A. This square hole (indicating).
Q. To the right of the pole?
A. Yes, sir.
Q. Would they go down in that to sweep it out, when they wanted to sweep it out?
A. Yes, sir.
Q. When would they sweep out the bin on your floor?
A. Whenever they would call from the floor up above; after they had run it, after they would run the grain out, maybe there was a couple of hundred pounds short, they would ask me to look into it.
Q. When was the last time you saw Ambrose alive?
[fol. 8] A. The last time I saw him alive was about 9 o'clock in the morning.
Q. Where was he at nine o'clock?
A. He was sweeping the floor.
Q. Sweeping the floor that I have shown you a picture of?
A. Yes, sir.
Q. Was there anybody with him on the floor, or was he alone?
A. He was alone?
Q. When you left him, he was alone?
A. Yes, sir.
Q. When did you next see him?
A. I saw him down on the bottom of the bin.
Q. What time was that?
A. I should judge about a quarter to ten, or ten o'clock.
Q. In the morning?
A. Yes, sir.
Q. Did anything cause you to look in the bin?
A. I heard a noise.
Q. What kind of a noise did you hear?

A. Something like a sort of hit, something hitting.

Q. Now, prior to your hearing a noise and finding this body, was there any Company working there with gas, exterminating insects in the grain?

A. Yes, sir; they were working on the floor up above, the belt floor.

Q. Their gas was on the floor above where he was?

A. Yes, sir.

Q. What were they doing on that floor?

A. Well, the way I heard it, they were running this grain on the belt floor and putting this powder through the grain as it came along with weevil bugs in it.

Q. Did you see any gas masks there?

A. Gas masks, no, sir.

Q. When you saw this body, then what did you do?

A. I called Mr. Fitzpatrick and told him to try to get Mr. Ambrose.

[fol. 9] Q. Then what did you do?

A. I called upstairs, I think, notified the office.

Q. Did the fireman come there?

A. The fireman came later on.

Q. Were you there when the fireman tried to get the body?

A. No, sir; I was not on the floor.

Q. Did you see the body when it was brought up?

A. When it was brought up from the bottom, yes, sir; I saw it later.

Q. Now, had the men been working on the elevator exterminating these insects every day?

A. They came there on the Tuesday.

Q. Did they work every day there?

A. No, sir.

Q. Well, they worked Tuesday, and what other times?

A. Tuesday and Friday when they drew the grain off.

Q. They were not there on Saturday?

A. No, sir.

Q. What do you mean, "when they drew the grain off"; what did they do to draw grain?

A. Friday afternoon they drew off the grain. I had nothing to do with that; that is done on the bottom floor. I had nothing to do with that.

Q. How many floors were there in the elevator?

A. About five or six.

Q. And when you found this body, did you go downstairs to the floor he had been working on?

A. I was on the floor at the time.

Q. When you heard the drop?

A. Yes, sir.

Q. Did you see him?

A. When I went up there to see what was wrong, I saw him.

Q. He was down at the bottom of the bin?

A. Yes, sir.

Q. You heard a noise, and saw this body at the bottom of the bin?

A. Yes, sir.

Q. Did you go to the place you last left him?

[fol. 10] A. I looked up the floor and I saw the light hanging into the bin.

Q. Did you go up to the floor you had last left him on?

A. Yes, sir.

Q. And what was the condition, what did you see up there?

A. The same as when we came in in the morning; everything was all right.

Q. You speak of a light; where was the light?

A. The light was hanging in the bin.

Q. Hanging up where his body was?

A. No, sir.

Q. Where was it?

A. The light was on a hook where we always kept it.

Q. Was the manhole cover off the hole?

A. When I heard the noise, yes, sir.

Q. What I am asking about is the examination after the man fell; you went up the floor he was working on?

A. That was on the same floor.

Q. What was on the same floor? He had to fall a distance down to the bottom of the bin?

A. Yes, sir.

Q. Was the bottom of the bin and the top of the bin on the same floor he was working on?

A. No, sir.

Q. What I am trying to find out is, did you go up on the floor where the top of the bin was, where you had left him sweeping?

A. Yes, sir.

Q. When did you do that?

A. When I heard the noise, I came out of the shanty; I looked up the floor; I saw this light hanging into the bin and I went and walked up there to see what it was.

Q. Did you see the light from the ground, or where were you standing when you saw the light in the bin?

A. Down at the shanty.

[fol. 11] Q. Is that down on the ground floor?

A. No, that is right on the bin floor.

Q. On the same floor that he was on?

A. Yes, sir.

Q. But not the same floor as the bottom of the bin and the top of the bin?

A. The top of the bin from where he was was 85 feet about; I didn't measure it.

Q. Is that all on the one floor?

A. No, from the bin floor down to the bottom floor.

Q. The bin goes from the floor he was working on down to the bottom floor, does it?

A. Yes, sir.

Q. Did you go up to the floor he was working on?

A. I was on the floor he was working on.

Q. You were on that floor at the time of the accident?

A. Yes, sir.

Q. You didn't see what happened?

A. No, I was in the shanty.

Q. Just a shed on that floor?

A. Yes, sir.

Q. As you came out, what did you see?

A. I looked on the floor and I saw this light hanging from the post.

Q. Where was the light hanging?

A. Into bin 81.

Q. That is the bin the body was found in?

A. Yes, sir.

Q. Was the cover on the manhole, or was it off the manhole?

A. It was off.

Q. How large is this manhole?

A. That I could not tell you exactly; they took the measurements later on.

Q. He had been working there, doing this work that you described, all the time that you had been there, had he?

A. Yes, sir.

Q. Was there anybody else under you besides him?
A. Fitzpatrick.
[fol. 12] Q. How long had he been there?
A. Maybe only a couple of weeks. He was put up there extra like.
Q. What did Fitzpatrick do?
A. He helped settle the trolleys and keep the floor clean also.
Q. Did he help this man that was killed, Ambrose?
A. Well, they both did the same work.
Q. Did he help him in doing the work?
A. Cleaning the bins.
Q. This man that has been working there for two weeks, did he help Ambrose in his work, or was he working separately from Ambrose?
A. No, they both did the same work.
Q. Where was he at the time of the accident?
A. He was on the other end of the floor.
Q. What was he doing?
A. Sweeping the floor.
Q. Were you there when the body came out?
A. No, sir.

Cross-examination by Mr. Carey:

Q. You had been down to the lower floor of the elevator before the accident?
A. That was before the accident.
Q. You came back to what you call the bin floor?
A. Yes, sir.
Q. That is the floor in which there are openings that lead down into the bin?
A. Right.
Q. And when you came back from the first floor, did you notice whether the covers were on these holes over bin 81?
A. They were on.
Q. They were on when you came back?
A. Yes, sir.
Q. And then you went into your shanty?
A. Yes, sir.
Q. You were there about how long before you heard this noise?
A. Maybe twenty minutes or more.

[fol. 13] Q. When you came back from the first floor, did you notice where the light was that you talk of?

A. We always got lights on the sides on a hook.

Q. And that is upstairs, as you see on this picture?

A. No, there was different places; you can't see it on there.

Q. What kind of light was that?

A. We call them inspection lights; they are drop lights.

Q. Electric or what?

A. Electric.

Q. You have a long cord to drop them into the bin?

A. Yes, sir.

Q. Yu have a long cord to drop them into the bin?

A. Yes, sir.

Q. Now, you mentioned being on the ground floor; was this electric light in its proper place on the post?

A. Yes, sir.

Q. And when you came out after hearing this noise, where was the electric light?

A. It was stuck in the post, in the plug and handing into the bin.

Q. How far down in the bin?

A. Well, swinging to the bottom.

Q. The first thing you saw after you came out, and looked, was that this light was gone from its post?

A. No; I looked on the floor; I saw it stuck in the post again.

Q. You mean the light socket on the floor?

A. In the plug.

Q. Was it in the electric light socket?

A. Yes, sir.

Q. The plug was not kept on the electric light socket on the wall only when you were using it?

A. Only if used.

Q. When you came out from your shanty, you found that the plug had been inserted into the socket, and that this [fol. 14] cord was leading down into the bin?

A. Yes, sir.

Q. Now, what was the position of the manhole?

A. It was off.

Q. The manhole cover was off, was it? And was the cover from any of these other holes off at that time?

A. One other cover; that is where the light was.

Q. Where the light's cord went down?

A. Yes, sir.

Q. Now, this Exhibit P-3, as I understand, is a picture of what you call the bin floor?

A. Yes, sir.

Q. Where this man was you were speaking about, Fitzpatrick, was over there (indicating); is that right?

A. Yes, sir.

Q. And where was the shanty?

A. The shanty was down over there. (Indicating.)

Q. Then it was on that floor, wasn't it?

A. Yes, sir.

Q. How many men worked on that floor?

A. There was only three of us.

Q. And they were: yourself?

A. Ambrose and Fitzpatrick.

Q. This picture shows what they call the bin floor; these covers that you see are in the cement floor and they lead right down into steel bins which hold thousands of bushels of g-ain; was that the place where Ambrose was sweeping around this room?

A. Yes, sir.

Q. Now, I call your attention to P-2, which I understood you were testifying from?

A. Yes, sir.

Q. That is a view of the bin looking down through these holes?

A. Yes, sir.

Q. You spoke of a set of trolleys; what does that mean?

A. They set them over the different bins of the shipping bins.

[fol. 15] Q. Is there any difference between the shipping bins and the storage bins?

A. Yes, sir.

Q. Do the shipping bins extend up to this floor?

A. Yes, sir; right level with the floor.

Q. Do they extend down as far as the storage bins?

A. No, sir.

Q. Which was the bin 81, a shipping bin or storage bin?

A. Storage.

Q. In shipping out grain, it is transferred from the storage bins into the shipping bins?

A. Yes, sir.

Q. And shipped out from the shipping bins?

A. Yes, sir.

Q. Were you present when this grain was being drawn off on Friday afternoon?

A. I was up on the bin floor; that was drawn from the bottom floor.

Q. Did you see any of that grain being drawn off?

A. No, sir; I didn't.

Q. You spoke of sending these men, these sweepers, into the bins; that was when you received information from the upper floor that a shortage had been found in connection with shipping grain out of the shipping bin that the grain was being shipped from?

A. Yes, sir.

Q. Now, on receiving information of that character, what would you do?

A. Why, we would put a man on sweeping around to get the grain out of it.

Q. Would any man go into the bin without instructions from you?

A. No, sir.

Q. Is that a rule on that floor?

A. Yes, sir.

Q. So that no man would go down to the floor unless he received orders from you or from the superintendent?

A. He was only to go in on orders of the foreman or the superintendent.

[fol. 16] Q. On the bin floor, any man who went in the bin, went in on the instructions of the foreman?

A. Yes, sir.

Q. Was anybody in attendance at the opening into the bin when the man was sent down into the bin?

A. One man usually stands on top to show the light down to him.

Q. So that two men were needed in the operation; one man went down into the bin and the other showing the light at the top?

A. Yes, sir.

Q. And watching the man in the bin?

A. Yes, sir.

Q. Did you receive any information in regard to looking in there for a bag that was stuck in the bin?

A. I was called up and asked to look to see if I could see a bag in there; they were missing one bag.

Q. Where did that call come from?

A. From the scale floor.

Q. That is above the bin floor, is it?

A. Yes, sir.

Q. What did you do?

A. I took a light and dropped it into the bin and I see the bag there.

Q. Who was with you at the time?

A. Ambrose.

Q. Did you say anything to Ambrose at the time?

A. He asked me what I was taking the light for and I told him what they were doing to bin 81 and that they had lost one of their bags. I told him to keep away from it as much as possible, not to go near it.

Q. Did you at any time give him instructions to go down into that bin?

A. No, sir.

Q. On that Friday or Saturday?

A. No, sir.

Q. Did you know that he was going into the bin?

A. No, sir.

Q. Was there any reason at all for his going into that bin?

[fol. 17] Mr. Simpson: I object to that as incompetent. That is a matter for the jury.

The Court: I will sustain the objection as to whether there was any reason for it.

Mr. Carey: Exception.

Q. You had looked into the bin on Saturday?

A. Friday.

Q. And was there anybody in the bin to get that bag when you looked into it?

A. No, sir.

Q. The grain was all out?

A. All out.

Q. There was no stoppage to the flow of grain from the bin?

A. No, sir.

Q. Nothing in the bin to change the flow of grain at all?

A. No, sir.

Q. From whom did the inquiry come to you with reference to looking into the bin?

A. Mr. Brewer.

Q. Did you report to him what you had found?

Mr. Simpson: I object to that; what difference does that make.

(Question withdrawn.)

Q. Was it necessary that you should open the bin and remove it from the bin?

A. No, sir; not as far as I know; nothing about it was done.

Q. Now, at the time you opened this bin on Friday to look in, was there an odor of gas from it?

A. Yes, sir.

Q. How soon did Ambrose look into the bin; also at that time?

A. Yes, sir.

Q. There was nothing for him to get in the bin except this little bag?

A. No.

Q. You said you told him to keep away; what did you tell Ambrose with reference to keeping away?

A. I told him to keep away from it. I told him I would not trust that stuff.

Q. Was he present at the time the preparation was being [fol. 18] mixed with the grain?

A. It was done in the bin.

Q. Was there anything in connection with this grain that was being run into the bin that required treatment of it in any way?

A. That I don't know.

Q. Do you know what became of this grain after it was drawn off?

A. No, sir.

Q. When you came on the floor on that Saturday morning, did you pass this bin 81?

A. Yes, sir.

Q. What was the condition as to the covers?

A. The covers were on.

Q. And when was the first time that you noticed that any of the entrances had been removed from this bin on Saturday morning?

A. After I heard that noise that Saturday morning.

Q. Did you give any orders to anyone to open these entrances?

A. No, sir.

Redirect examination by Mr. Simpson:

Q. This man worked there for thirty years?

A. Yes, sir.

Q. Do I understand you to say that he was never to move hand or foot unless you gave him a direct order?

Mr. Carey: That is objected to; I don't think there is any such testimony.

Mr. Simpson: I will reframe the question.

Q. Did you not say, as I understand it, on cross examination, that this man who had worked there so long never did a single thing without you directed him to do that specific thing?

Mr. Carey: I object to that.

The Court: I will permit it.

A. Not while I had charge of that floor, no, sir.

[fol. 19] Q. Then he had to speak to you, and you had to tell him to sweep?

A. I would not tell him to sweep; he knew, that was in his line of work.

Q. What did he do besides sweep?

A. That was a standing rule at all time, to keep the floor clean.

Q. He was doing that the last time you saw him?

A. Yes, sir.

Q. You told him to keep away from this place as much as possible; what do you mean, as much as possible?

A. Not to hang around the bin.

Q. Did you smell the odor of gas on Friday?

A. Yes, sir.

Q. Had you gone down to the superintendent and told him about it, that it was dangerous to work up on that floor?

Mr. Carey: I object to that.

(Question withdrawn.)

Q. Did you notify any of your superiors that there was gas on this floor?

A. They knew there was gas.

Q. Did you notify them?

A. No, sir.

Q. What time of the day did you go in and found this bag there?

A. The exact time I don't know.

Q. Was it the afternoon?

A. In the afternoon.

Q. Ambrose was with you, was he?

A. Yes, sir .

Q. You did not get the bag out?

A. No, sir.

Q. You just saw the bag there and you reported to somebody that it was there?

A. Yes, sir.

Q. How far down was that bag?

A. I will show you on the picture.

Q. In feet?

A. In feet I could not say.

Q. Was it near the bottom?

A. I judge, I noticed the rungs; it was about five or six rungs from the bottom, that is the cross pieces.

[fol. 20] Q. Did the gas seem to come from the direction of this bag?

A. Yes, sir; came right up the bin.

Q. You said sweeping was in his line of general work; he would know enough to do that without orders. What else was in his general work?

A. Set trolleys.

Q. What did he do, set them in the bin?

A. Set them for these bins, yes, sir.

Q. Where did this trolley come from?

A. Well, they are not single——

Q. What is the trolley for?

A. It is set in the bin to deliver the grain to the bins.

Q. This was a storage bin, wasn't it?

A. Yes, sir.

Q. Where would the grain come from in this bin when you set the trolley?

A. It came from the scale floor.

Q. Where would it go out of this bin?
A. When they would draw it out from the bottom floor.
Q. At the time of this accident, this bin was empty except for the bag, wasn't it?
A. Yes, that is right.
Q. When had the grain been put through?
A. That same grain they were experimenting with?
Q. Yes?
A. Friday afternoon.
Q. Were they experimenting in this bin after?
A. That one afternoon.
Q. This grain had been drawn off the Friday before?
A. Friday afternoon, yes, sir.

Recross-examination by Mr. Carey:

Q. The setting of the trolleys was done on a direction from you?
A. Yes, sir.
Q. On whose direction?
A. I would get a call and put the trolleys down.
[fol. 21] Q. Sweeping and setting trolleys was work Ambrose was generally employed in?
A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. He was there to do anything he was told?
A. In the line of work, floor work.
Q. Didn't you get orders from upstairs for setting trolleys?
A. Yes, sir.
Q. Would they ever give them to him?
A. No, sir.
Q. They would give them to you?
A. They would give them to me.

JOHN E. FITZPATRICK sworn for the plaintiff:

Direct examination by Mr. Simpson:

Q. Where do you live?
A. West New York.

Q. Were you working in the Weehawken Grain elevator at the time of Ambrose's death?

A. Yes, sir.

Q. Where were you working?

A. Working in the bin floor.

Q. Were you on the same floor with him?

A. Yes, sir.

Q. Did you see what he was doing before he went down this hole?

A. Sweeping the floor, the same as I was.

Q. Where would you put the sweepings; where did they go?

A. Sweep it in heaps; sometimes threw it out of the window.

Q. When all these manholes were covered up, did you sweep the whole floor or only part of it?

A. All over.

Q. Right over the manhole cover you swept?

A. Yes, sir.

[fol. 22] Q. Then you would get it in heaps and then throw it out?

A. Yes.

Q. Where was Ambrose when you last saw him alive?

A. On the floor, sweeping.

Q. And the next thing you knew,—when did you know that there had been an accident?

A. I heard a noise; I paid no attention to it, because I used to hear them around there, knocking; then Mr. Dillworth came running up a few seconds after and he said "Get some help; Ambrose is in the bin."

Q. Did you smell any gas at any time that week?

A. No, sir; I can't smell.

Q. You have lost your sense of smell?

A. Yes, sir.

Q. How far were you from the bin he was found in?

A. Probably a hundred or so feet, or more.

Q. You didn't know anything about this until you heard this noise?

A. No, sir.

Q. What was his general work around there; what did he do?

A. I don't know.

Q. What did you do?

A. Sweep and move the trolleys and help around.

Q. Did you help him in his work?

A. No more than help moving the trolleys.

Q. Did he ever give you any orders, tell you to go help him?

A. No, sir.

Q. Who told you what to do?

A. I got orders from Mr. Dillworth; got an order to set the trolleys or move them.

Q. Mr. Dillworth would tell you the trolley to move, and you would go and move it along with Ambrose?

A. Yes, sir.

Q. How long had you been working there?

A. Two weeks.

Q. That is all you did, all the work you did on that floor; you didn't do anything else?

A. No, sir.

[fol. 23] Cross-examination by Mr. Carey:

Q. Were you present on the bin floor on Friday afternoon when this grain was drawn off?

A. I was on the bin floor.

Q. Did you hear anything of a bag being missing?

A. No, sir.

Q. Did you see Mr. Dillworth and Mr. Ambrose at bin 81 on Friday afternoon?

A. No, sir.

Q. Opening up the bin and looking into it?

A. No, sir.

Q. You didn't see them?

A. No, sir.

Q. Did you hear Mr. Dillworth say anything to Mr. Ambrose about keeping away from bin 81?

A. No, sir.

Q. You didn't hear?

A. No, sir.

Q. Did you notice whether the covers were on bin 81 on Friday afternoon?

A. Yes, sir.

Q. Were they?

A. Yes, sir.

Q. On Saturday morning, what time did you go to the elevator to work?

A. About eight o'clock.
Q. You passed bin 81?
A. Yes, sir.
Q. At what time?
A. I could not just say; it was before eight o'clock.
Q. Do you know whether or not Ambrose was on bin 81?
A. I don't know.
Q. Did you see anybody removing these covers?
A. No, sir.
Q. When did you first know that anything had happened to Ambrose at bin 81, that he had been injured?
A. I didn't know anything about it until the accident.
Q. Until after the accident?
A. After the accident.
Q. Did you go to bin 81 after the accident?
A. No, sir.
Q. Didn't go there?
A. No, sir.

[fol. 24] Redirect examination by Mr. Simpson:

Q. How many covers were on bin 81?
A. That I could not tell; I am not familiar with that, I don't know.
Q. Mr. Carey asked you how many covers were on there that morning; do you know whether they were on or not?
A. No, sir.
Q. How high were the covers from the floor?
A. Level.

PAUL S. SHANAHAN sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. What is your occupation?
A. Superintendent on grain elevator.
Q. You were in complete charge of it?
A. Yes, sir; of the elevator.
Q. Of that elevator; I am talking of that one elevator?
A. Yes, sir.
Q. Was there any exterminating company doing anything in that elevator with a view to exterminating vermin?
A. Yes, sir.

Q. What company was doing the exterminating?

A. Air Reduction Sales Corporation and the Cal Cyanide Co.

Q. Where were they doing this?

A. Pier 7, Weehawken.

Q. Is that where this elevator is?

A. Yes, sir.

Q. During the time this exterminating was going on, were you present at all?

A. No; I was there on Friday.

Q. What were you doing while you were there Friday?

A. I was at lunch; I went to lunch about 11:30 and got back about 1 o'clock; it was on Tuesday, I believe, if I recall the correct day.

[fol. 25] Mr. Carey: Louder and talk to the jury.

The Witness: On Tuesday afternoon, or Tuesday about 11:30 I went to lunch and on my return, my chief clerk notified me that Mr. Hubbell, representing the Cyanide people, and a representative from the Air Reduction Company, were there and wanted to have the use of this elevator to experiment in the extermination of insects in the grain.

Q. Will you tell us what that is?

A. Boll weevil, similar to the boll weevil that is in cotton. It was centered in the soft winter grain, all through the southwest, and they wanted to experiment with it in this grain.

Q. They wanted to experiment with this gas on these insects?

A. Yes, sir.

Q. Did you see what they did when started to work there?

A. I went up and asked this Mr. Hubbell if he had secured the authority to go ahead with this experiment. He said that he had previously experimented, and he would get me a letter assuming all responsibility relative to anything that would happen or any damage done by this experiment which he intended to do. Eventually he satisfied me that he can get letters to authorize him to go ahead with the experiment.

Q. What did he do after that?

A. Why he had a man operating the apparatus for distributing the cyanide through the grain at a certain specified flow.

Q. About what time did he satisfy you he could get a letter?

A. Shortly after lunch. I got back about 1 o'clock, or in that neighborhood.

Q. Then what did you do?

A. I had to go upstairs there with him. As far as his [fol. 26] experiment was concerned, our men would have nothing whatever to do with it, he would have to carry out his experiment himself, with his own employees. We would give him the stuff, the men would have the grain ready to go into the bin. We issued our instructions that none of our men should go near that bin while the cyanide was being used.

Q. Did he say how long it would take to do this experimenting?

A. It would stay in there about 72 hours.

Q. When was the first day they started?

A. Tuesday.

Q. So that they worked on and off there Tuesday?

A. No, they didn't work off and on. They put the stuff in on Tuesday afternoon.

Q. Where did they put the gas in, into the grain?

A. They were to put the weevil bags in there to be used in the test.

Q. On Tuesday he started putting these things in the grain?

A. Yes, they put the weevil in; they put this boll weevil in in bags.

Q. They put the insects in too?

A. In bags.

Q. In these little bags, carrying these insects?

A. Yes, about forty bags.

Q. Do you know they did that?

A. Put them in and then they had this distributing machine with a little motor on it, which would be adjusting itself to the proportion of the flow of grain.

Q. Was it near this bin 41 they were working?

A. 81?

Q. Was it near this bin?

A. No, it was above.

Q. There is some testimony about one of the bags being caught in the bin; do you know anything about that?

A. That happened evidently when they pulled it off on Friday.

Q. Do you know of any time they were working in the [fol. 27] vicinity or in bin 81 with the gas?

A. No, not to my knowledge.

Q. When he told you he would assume all responsibility, he didn't supply any gas masks, or printed notices, or anything of that kind?

A. None whatsoever.

Q. These bins that the gases were in were not sealed at the top so that the gas could not get out?

A. There was only one bin.

Q. This bin was not sealed?

A. That was the only one we were using.

Q. It was not sealed at the top?

A. No.

Cross-examination by Mr. Carey:

Q. When you told this man you wanted him to get a letter showing authority for experimenting in the elevator, you meant letters from whom?

A. From the New York Central Railroad.

Q. Did he do it?

A. No, sir.

Q. Did you ever receive any such letter?

A. No, sir.

Q. You spoke about a machine for distributing the gas in the grain?

A. Distributing the powder; it was not gas; it was in powder form.

Q. So that when this drug was applied to the grain, it was in powder form?

A. Powder form.

Q. How did the gas result from that powder that was distributed in the grain?

A. Coming in contact with the air and the moisture contained in the grain, nine per cent gas, and air would form it into the gas; that is the way it was explained to me.

Q. Did he say that?

A. He said that it goes in in powdered form, and coming in contact with the moisture contained in the grain, which is natural containing a certain percentage of moisture, it forms a gas after it arrives in the bin.

[fol. 28] Q. So the gas is formed after the powder and grain are in the bin?

A. So they informed me.

Q. Now, this powder was mixed with the grain on the floor above the bin floor?

A. Yes, sir. Into the spout.

Q. And then it came down through the spouts?

A. Yes, sir.

Q. And into the bin?

A. Yes, sir.

Q. Was this running of the grain into the bin all completed on Tuesday?

A. Yes, sir.

Q. Do you know whether the bin was then covered or not?

A. Yes, sir; I was instructed that Mr. Hubbell was to look after that matter.

Q. Were you on the bin floor after Tuesday?

A. Yes, I had been up there. I don't recall just what day it was. I had a conference with Mr. Dillworth. I told him to keep everybody away from the bin. I just don't remember what day it was.

Q. Was this grain which was run through that experiment treated in any way for the preparation of the grain for shipment?

A. No, did not need any treatment.

Q. The weevil which were in the grain were put in by the experimenters?

A. By the experimenters.

Q. Did you see any of these bags of weevil after they were taken out on Friday?

A. Yes. Friday night.

Q. Did you notice what the condition of the weevil was?

A. About eighty per cent killed, on account of them losing a bag, that would bring it up, the percentage to 100 per cent kill.

Q. After this grain had been treated in the way you speak of, and after it was drawn off, what was done with it?

A. Put back in storage.

[fol. 29] Q. It was taken from storage and put back in storage?

A. It was taken from storage and put back there.

Q. You have informed that one of these little bags had been lodged in the bin?

A. I don't recall; I think I was, yes, sir; Friday I think Mr. Hubbell said that one of his bags was gone, but it was immaterial.

Q. Did you look into the bin?

A. No, sir, not at that time; I was leaving for Buffalo.

Q. The removal of this little bag with some weevil in it, was it necessary for the operation of the elevator bin that they should be removed?

A. No, sir.

Q. Would you have had it removed at any time?

A. No, sir.

Q. What was the rule with respect to men going into bins?

Mr. Simpson: I object to that. If the rule is in writing, it ought to be produced. If it is not in writing, it has to be shown where it was brought to the attention of the deceased.

(Argued and question withdrawn.)

The Court: How would you get into this bin, if a man wanted to go in.

The Witness: Would have to lift the cover off; first, before that, he would have to get a light and drop it down. He would have to lift the cover off and climb down the ladder.

The Court: There was no way of getting through the bottom?

The Witness: Not without a ladder put through the opening in the lower part of the bin.

[fol. 30] The Court: There were no openings on the way down?

The Witness: No, sir.

The Court: No opening in this bin except the one at the top?

The Witness: Yes; there is one for the manhole and one for the spout.

Q. Did you give any instructions to your foreman, Dillworth, with reference to the men going into the bin?

A. That would have to go back to the time I took charge of the elevator for permission to do that.

Q. I am directing your attention to instructions with reference to sending men into the bin?

A. When I took charge of the elevator, there was no system on the floor. I put a man in charge of everything, took charge of instructions and there was no orders to be taken from any man unless it came through the proper channels and would go through him.

Q. What instructions did you give him with reference to sending a man or directing a man to go in the bin?

Mr. Simpson: I object to that unless he points out who is meant by "him."

Q. I mean Dillworth, the foreman?

A. I instructed Dillworth that no man was to do it, to instruct his men that no man was to go into the bin without direct instructions by him or from him, received either through the Chief Weighmaster or through the office.

Q. Did you give any instructions there Friday that no one was to go into the bin?

A. I gave instructions on Tuesday for the men to keep away.

Q. Did you give any instructions there on Friday after- [fol. 31] noon, after the grain was drawn off, until after this accident, that no one should go into the bin?

A. No, sir; only previous.

Q. Were you there up to the time the grain had been completely drawn off from this bin on Saturday?

A. Yes; Friday.

Q. Was it all drawn off from the bin?

A. Yes, sir.

Q. I think you have testified already with respect to the condition of this grain, and whether or not it was infected in any way?

A. It was not.

Redirect examination by Mr. Simpson:

Q. How long had Mr. Ambrose worked there at the time of his death?

A. I think I re-employed Mr. Ambrose as soon as I came there. I don't recall exactly, but about six and a half years.

Mr. Carey: I can't hear you.

The Witness: I employed Mr. Ambrose shortly after I took charge of the elevators.

Q. To do what?

A. House man.

Q. What does that mean?

A. It means we have them assigned to two different types of work. We had two of them on the bin floor, one of them down in the office; he works wherever we assign him to for specific work; at that time, assigned to work under one of the heads of departments——

Q. He was the houseman assigned to this floor on the day of his death?

A. Assigned to Mr. Dillworth.

Q. And he took charge, you told Mr. Dillworth nobody was to go into the bins without instructions from him?

A. Yes, sir.

Q. You left it to Dillworth to carry that out?

A. Yes, sir.

[fol. 32] Q. You testified you told everybody to keep away from this bin 81?

A. I didn't tell everybody; I always give my instructions to the head of the department.

Q. You gave instructions to Dillworth to keep everybody away from bin 81; that was Tuesday?

A. Yes, sir.

Q. Did you know he had taken the cover off and with Ambrose looked down in the bin?

A. He had instructions.

Q. He received them from whom?

A. From the lower floor, from Mr. Brower to Mr. Dillworth.

Q. To do that?

A. Yes, sir.

Q. So that the fact of your telling him to keep everybody away on Tuesday had no effect on him then?

A. That was an order.

Q. Then Dillworth and Ambrose both took the cover off and looked in?

A. Yes, sir.

Q. Did Dillworth report to you that when he looked in there, there was a smell of gas?

A. No, sir.

Q. Were you instructed by the people in charge of this cyanide gas that this gas was instantaneous death?

A. I knew that.

Q. You knew that it was instantaneous death?

A. Yes, sir.

Q. Do I understand you to say that Ambrose was to be assigned to every specific task; for instance, if the floor was to be swept up, that he could not start to sweep up the floor unless Dillworth told him?

Mr. Carey: I object to that; there is no such evidence.

The Court: The question is, is that what he means.

[fol. 33] Q. Is that what you mean: this dead man could not pick up a broom to sweep the floor; he could not adjust a trolley, unless he was ordered to do that by Dillworth; unless Dillworth told him to do that very thing; is that what you mean?

A. That is the rule there. There is a certain amount of judgment to be used on every rule. You can't stand on an iron-clad rule.

Q. Wasn't he left to his own common sense in certain things?

A. No, Mr. Dillworth was instructed to give him such orders as he saw fit.

Q. When Dillworth took him and opened the cover and stuck him over to look in, the bin was already filled with cyanide gas in the bottom?

A. No.

Q. Now, you say that Ambrose was not left to his own judgment in doing anything. He could not take up a broom without Dillworth saying "you take up that broom." He could not sweep the floor unless Dillworth said "Sweep the floor." He could not put on a trolley unless Dillworth told him "Put on a trolley." Is that what you swear?

Mr. Carey: I object to that; there is no such evidence in the case from anyone. That is based upon an assumption of facts that do not exist.

The Court: As I understand, it does not purport to be a question from the testimony that is in, but is asking him what he means, if that is what he means.

The Witness: That was my idea in starting there, with Dillworth there, to prevent that.

Q. Prevent them from doing what?

[fol. 34] A. From anybody doing anything they want to do, that is, promiscuously.

Q. If Dillworth told him to go and look through a hole in a bin where there was cyanide gas, was he to do it?

Mr. Carey: I object to that; there is no evidence that Dillworth told him to look in.

(Argued and question withdrawn.)

Q. Do you know anything about Dillworth's daily work with this man; did you check up on him or simply leave it to him?

A. Go through the place occasionally to check up on all the workmen.

Q. Do you go through every day?

A. No, not necessarily.

Q. In other words, Dillworth was put over this floor, and he was supposed to be doing whatever in his judgment was right to do on that floor?

A. Whatever was the instructions from the top floor.

Q. Who is the top floor?

A. The Chief Weighmaster's department. Chief Weigher.

Q. What did the Chief Weigher do?

A. He gave him instructions as to the spouts they wanted set, where they wanted them set, what bins, what bins to use.

Q. And he would clean up the bins on that floor?

A. It is very rarely they clean up the bins.

Q. You just let the grain remain there?

A. They are self cleaning, the majority of the bins.

Q. How do you know whether a bin is clear, or whether there is anything in there?

A. Because when the bin runs out of the bottom, the shipper received an invoice and checks up with the weigher.

[fol. 35] Q. Is it necessary to take the manhole cover off when the bin is being filled?

A. Either the manhole or the spout hole when the spout fits in there——

Q. Do you know whether anybody got that bag out that was found in there?

A. No.

Q. You didn't tell these men that there was cyanide gas in there, and that if they inhaled it, it would kill them instantly?

A. No, sir.

Recross-examination by Mr. Carey:

Q. How long is the bin floor?

A. It is in the neighborhood of 300 feet long, about 130 feet wide; I don't know exactly.

Q. You spoke about being in complete charge of the elevator; you mean by that in full charge of the operations, of the ordinary business of the elevator?

A. Well, everything, the business operation.

Q. Did you have any authority with respect to granting permission to people to go in there and make experiments for their own purposes?

A. None whatever.

JOHN D. AMBROSE sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?

A. 113 13th Street, West New York.

Q. It is your father who was killed?

A. Yes, sir.

Q. Did you on summons go to the place where he was killed?

A. Yes, sir; I did.

Q. What time did you get there?

A. I got there about twenty minutes to eleven.

Q. In the morning?

A. Yes, sir.

Q. What was the condition when you got there?

A. Why, the condition when I got there, I asked what was the matter.

[fol. 36] Q. Did you see your father's body?

A. No, when I arrived upon the floor where he worked, I wanted to go down there, but they told me I could not anyway.

Q. What is your business?

A. West New York police, traffic officer.

Q. Do you live in West New York?

A. Yes, sir.

Q. Did you go right to the place where he was killed through the action of the cyanide gas?

A. I didn't go right to the place. I am acquainted with the place; I know the building. I went looking through the building. I was on the motor floor and I found three other cans up there.

Q. Where?

A. On the motor floor; there is two floors above the bin floor.

Q. It is in the elevator?

A. In the elevator, on the motor floor.

Q. Now, what time of the day did you find it?

—. Half past eleven or a quarter to twelve the same morning.

Q. Where did you say you found these, in the elevator?

A. On the motor floor.

Q. How near is that to this bin 81?

A. Well, that is about, I am not sure if two or three floors above it; it would not be more than about 150 feet from bin 81.

Q. Were there more cans than these?

A. Yes, there was three other cans besides that one.

Q. Containing material like this?

A. Yes, sir.

Q. Did you deliver this can to Mr. Sinnott of my office?

A. Yes, sir.

Q. You delivered this can to him?

A. Yes, with my brother.

Mr. Simpson: I will have this marked for identification only.

Marked for identification as Plaintiff's Exhibit P-4 for Identification.

[fol. 37] JOHN A. SINNOTT sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. You are employed as an investigator by me?
A. Yes, sir.
Q. The last witness delivered this can and its contents to you?
A. Yes, sir.
Q. When did he do that, do you know?
A. I should judge about a month ago.
Q. Did you take these contents or any part of the contents to anyone?
A. Yes, sir; I took it to Mr. C. L. Devitt, Chemist; also to Dr. Sachs at the North Hudson Hospital.

Cross-examination by Mr. Carey:

Q. When did you receive this can?
A. About a month ago.
Q. You delivered it immediately to the doctors?
A. Yes, sir.

JOHN D. AMBROSE recalled.

Direct examination by Mr. Simpson:

Q. Was the can and contents I showed you in exactly the same condition when you delivered it to my office as when you found it?
A. Yes, sir.
Q. You had not touched it at all?
A. I had not touched it at all; in the same condition.

Cross-examination by Mr. Carey:

Q. Where had it been kept during this time?
A. It had been kept in my cellar.
Q. What was the date when you got it?
A. The same day that father was killed, July 16th, 1927. At half past 11 in the morning when I got the can.
[fol. 38] Q. This can has been kept in your cellar since that time?
A. Yes, sir.

Q. Until you delivered it to Mr. Simpson?

A. Until I delivered it to Senator Simpson's office.

Q. Lots of people have access to your cellar besides yourself?

A. Not in our apartment house; the apartment is locked.

Q. Do you mean that?

A. Absolutely; it is two families. We have two rooms in the cellar; one for the tenant downstairs and one for us.

Q. Nobody but yourselves have access to your compartment?

A. Nobody outside of my mother and myself, the family of course.

Q. Your mother and yourself?

A. And my brother Willie.

Q. But other people go in there occasionally?

A. None whatever in our compartment in the cellar; the tenant downstairs goes in theirs.

Q. Nobody but you and the members of your family ever get into that compartment?

A. Absolutely not.

Q. You are sure about that?

A. Yes, sir.

Q. You are there all the time?

A. I am not there all the time, but I keep it locked all the time.

Q. You carry the key?

A. I don't carry the key.

Q. The key is left in the house?

A. Yes, sir.

Q. You are away eight or ten hours?

A. About eight or ten hours a day.

Q. And you don't know who goes in there when you go away?

A. Nobody but my mother.

Q. How do you know nobody but your mother goes into that compartment?

A. Because the keys are upstairs; nobody can go in unless they break it in.

[fol. 39] Q. Couldn't your mother let somebody in there?

Mr. Simpson: I object as a conclusion on his part.

Q. You mean to swear that nobody but yourself or your mother has been in that compartment from the time that can

was taken there until you delivered it to Mr. Simpson's man?

A. I will swear I seen nobody in there.

Dr. HAROLD M. SACHS sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. You are a practicing physician and surgeon?

A. Yes, sir.

Q. Where do you practice?

A. At the present time I am completing a twelve months internship at the North Hudson Hospital.

Q. Were you called to the Weehawken Grain Elevator on the 16th of July, 1927?

A. Yes, sir.

Q. Were you then connected with the North Hudson Hospital?

A. Yes, sir.

Q. How did you get to the elevator, on the ambulance?

A. At that time I was on the second month of my service and so I was riding the ambulance.

Q. When you got there to the Weehawken Elevator what did you see, what condition did you see?

A. They took us up to the top floor of the elevator and there was a lot of commotion around and they offered me a gas mask. As I entered I smelled, as I entered the fourth floor, or whatever the floor, an odor.

Q. Did you smell gas?

A. I smelled a peculiar odor of gas. Then I went over to where the excitement was. They gave me a mask and [fol. 40] told me to go down and bring the body up, or pronounce him dead. I looked down this bin and saw a lifeless body down there, and there was no motion in the body and I had to go away immediately, because the odor was too strong, and I was told that in the gas mask was ammonia.

Q. You were then in this position, as I understand it, showing you this photograph, looking down this bin 81 where this odor of gas was strong?

A. Yes, sir.

Q. On this floor; this is a picture looking down; you were on the floor on the top?

A. I was on the top.

Q. You say the odor of gas was so strong, you had to get away?

A. I had to go away.

Q. When you went away, did anybody put the gas mask on, and was anybody lowered down with a rope?

A. In the meantime, I believe the West New York Fire Department was called and one of the firemen came and he volunteered to put the gas mask on and go down. I told the fireman at the time——

Mr. Carey: I object to what he told him.

The Witness: He went down, the fireman went down. I believe he went down approximately about ten feet and he started signalling with his hands, he asked to be taken up. He was taken up immediately and he was taken away.

Q. Did he faint as soon as he got out?

A. I didn't see the finish.

Q. You were then on your way?

A. It was suffocating gas——

Mr. Carey: I object.

The Witness: He was taken away from the manhole.

[fol. 41] Q. Did he indicate any symptoms of incipient suffocation?

A. He was giddy and dizzy and showed signs of vertigo which is the initial symptom of suffocating gas.

Q. He was taken away; what is the next thing that happened?

A. We stood around there and saw it was useless for anybody to go down there to pronounce the man dead, or bring the body up. So they decided that the only way was to bore a hole from the bottom of the bin and bring the body through. I think I called the hospital and told them I would be down with the ambulance another hour. I stayed around until about 11:30 and the body was taken out and I pronounced the man dead.

Q. Did you form an opinion as to the cause of death?

A. The cause of death I gave on the emergency card, which we had to fill in.

Mr. Carey: I object to that.

The Witness: I took the body; the body was taken——

Q. Don't tell us about the emergency card. Did you form an opinion from what you saw or observed of the body and the surroundings as to the cause of death?

A. I pronounced the man dead.

Q. Then the answer should be yes?

A. Yes, sir.

Q. What was your opinion as to the cause of death?

A. My cause at the time was cyanide poisoning.

Q. Now, you know something of chemistry, don't you?

A. Yes, I have the M. S. degree.

Q. You have a degree of chemistry?

A. Yes, sir.

Q. Did Mr. Sinnott hand to you the contents of this can, part of the contents of the can?

A. Yes, sir.

[fol. 42] Q. Did you analyze it?

Mr. Carey: How do you know it was part of the contents of the can?

Mr. Simpson: I withdraw the question.

Q. Did Mr. Sinnott hand you a substance for analysis?

A. Yes, sir.

Q. Was the substance handed to you cyanide?

A. Yes, sir.

Q. What are the symptoms of cyanide poisoning, when a man is killed with cyanide gas, is it quick or slow; how does it act?

A. It depends on the quantity present.

Q. Can a man take enough to cause instantaneous death?

A. Yes, if the body is so dense, death almost instantaneously.

Q. How does cyanide act on the heart?

A. Cyanide acts on the central nervous system. It is immediately taken up through the blood; and acts on the centers of the brain; it causes interference with the respiration; the patient ceases to breath almost immediately.

Q. Also accompanied by the symptoms you saw in the fireman after the fireman got through there, the dizziness, vertigo?

A. Those are the initial symptoms.

Q. That is dizziness and vertigo?

A. Yes, sir.

Q. What was done with the body, was it taken to the hospital, or what happened to him?

A. No, the body was taken to the morgue. When a man is pronounced dead, we do not remove him to the hospital.

Cross-examination by Mr. Carey:

Q. Did you examine this body after it was taken out?

A. Yes, sir.

[fol. 43] Q. What did your examination consist of?

A. I listened to his heart. There was no evidence of any life. I examined his pupils; the pupils were dilated. The odor on his clothes was that of a pungent, offensive odor, suffocating odor. As a matter of interest, I also examined a few bones. He had a fracture of both bones of the left arm. I was questioned at that time by a certain gentleman——

Q. Never mind about that; I am asking what you did?

A. As I said, I examined his heart and pulse; he was pulseless; the pupils were dilated, and I pronounced him dead.

Q. Is that all the examination you made of him?

A. Yes, I examined him grossly for injuries to his extremities.

Q. Did you find any injuries to his extremities?

A. I did find a fracture, I think of his left forearm. I didn't put it on my emergency card. I didn't care to go any further, to ascertain whether or not he had a fracture of the skull.

Q. What I want to know is just what you did by way of examination; you did not examine for fractured skull?

A. No.

Q. Or for any fracture except fracture of the forearm?

A. Yes, sir.

Q. He may have had various fractures about his body, without your having discovered them?

A. Yes, sir.

Q. He may have been killed by the fall?

Mr. Simpson: I object to that; how can he say he may have been killed by the fall. He tells us that in his opinion

this man died of gas poisoning. That is entirely too speculative.

The Court: Sustained.

[fol. 44] Q. Wasn't his body pretty badily bruised?

A. No.

Q. From just this examination which you have testified to, you concluded that he died of cyanide poisoning?

A. Yes, sir.

Q. Nothing else?

A. He might have died of—There was enough cyanide gas there, sufficient——

Mr. Carey: Just a minute.

Mr. Simpson: I object to counsel interrupting the witness.

The Court: Give a responsive answer to the question and nothing else.

The Witness: There was sufficient gas there to cause the giddiness to make the man fall and if he did fracture his skull, which I was not interested in at the time, that was secondary.

Q. When you say that there was sufficient gas there, to what time do you refer?

A. About 9:50 A. M.

Q. Is that the time you were there?

A. The accident happened at 9:50. We got down in the ambulance probably at 10 o'clock.

Q. Are you speaking of the condition as to the time you were there, or at some other time?

A. At the time I was there.

Q. Where did you note that gas condition?

A. I was aware of the gas as soon as we were taken up to the top.

Q. Where did you notice sufficient gas to result in death, as you have testified?

A. At the top of the manhole there was sufficient gas.

Q. What was your position over the manhole at the time you discovered this strong odor of gas?

A. Well, I was bending over. As I was bending over, I [fol. 45] saw the body and smelt this very pungent odor of gas.

Q. Was your face down close to the opening?

A. No, I got away pretty quick.

Q. I don't think you understand my question. When you first discovered this pungent odor of gas, were you bending over the opening at the manhole?

A. I was bending over, yes, sir.

Q. How close was your face to the manhole?

A. I should judge about three feet.

Q. How long did you remain in that position?

A. Probably about five seconds.

Q. Then you got away?

A. Then I got away.

Q. The gas was sufficiently strong so that anyone who was in the position you were in, would have been immediately aware of the fact that there was a strong current of gas?

A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. What does dilation of the pupils indicate, do you say; would that indicate to you cyanide poisoning?

A. Dilation of the pupils is a sign of cyanide poisoning, but at the same time it is also a sign of death.

Q. Is it a sign of cyanide poisoning?

A. Yes, a sign of cyanide poisoning.

Q. Did you find that sign?

A. That sign was present.

Q. As I understand you got there at 10 o'clock?

A. Approximately.

Recross-examination by Mr. Carey:

Q. What else is dilation of the pupils a sign of?

A. Why dilation of the pupils is a sign of death. I want to bring out a point here; had the man had a fractured skull at the time—

[fol. 46] Q. Tell me what else dilation of the pupils is evidence of besides cyanide poisoning?

A. Dilation is a sign of death.

Q. It is a sign of cyanide poisoning and of death; that is all?

A. Oh, no, dilation of the pupils could occur in a fractured skull; could occur in numerous conditions.

Q. A blow or fall would produce dilation of the pupils, wouldn't it?

A. Yes, but not equal dilation of the pupils. If a man with a fractured skull was injured on the right side, he would not have dilation on the right side, but on the left side; there would be a dilation of the left pupil, but not of both pupils.

Q. Well, suppose the blow was in the middle of the forehead?

A. It would all depend upon the pressure on the nerve that was irritated.

Q. So it would in respect to any trauma or blow, wouldn't it?

A. Yes, sir.

Q. Is there anything else that dilation of the pupils is indicative of?

A. Why, drugs cause dilation of the pupils.

Q. A great many things?

A. Yes, sir.

Redirect examination by Mr. Simpson:

Q. Mr. Carey stopped you when you said you wanted to bring out some information or point; what was that?

Mr. Carey: I object to that.

Q. What were you referring to when you said about bringing out a point here, when Mr. Carey said "never mind." What were you referring to just a minute ago?

[fol. 47] Mr. Carey: I object to that as improper and immaterial.

The Court: Sustained.

Q. You understand what I mean?

A. I don't just recall.

Q. You said "here I want to bring out a point," and Mr. Carey shut you off and said "never mind the skull." Can you remember what you were trying to tell the jury?

Mr. Carey: I think the Court sustained the objection to that.

The Court: Sustained.

Q. Will you tell me what you meant when you said "I want to bring out a point here." What were you going to discuss?

A. I think I know your point.

The Court: I think you should reframe the question.

Q. What was it you wanted to bring out?

Mr. Carey: May I have an exception noted.

A. The man possibly could have had a fractured skull. No doubt a man falling the depth that he fell, he should have had some fracture and I was not interested to find out whether he had a fractured skull or not, but the point that I want to bring out, that the gas was of such density and so strong that it was sufficient enough to make a man dizzy, to permit him to fall so that if he did have any fractures, they were secondary to the initial gas.

Recross-examination by Mr. Carey:

Q. Do you know how far he fell?

A. I don't know. I believe somebody said about 300 [fol. 48] feet. He fell from the top.

Q. You don't know anything about the extent of the fall, do you?

A. Why, he fell from the top.

Q. How do you know that; it would be very interesting if you know that. Lots of people would like to know it. You don't know anything about where he fell from?

A. The depth of the fall I could not tell you.

Q. You don't know what his position was when he fell?

A. No.

Q. You were not there at all?

A. No.

Christopher L. Devitt sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. What is your profession?

A. Chemist; analytical chemist.

Q. Where do you practice your profession?

A. Jersey City.

Q. Did you receive a substance from Mr. Sinnott of my office for the purpose of analysis?

A. On April 19th I received this packet from your office.

Q. What was it, what was the contents of it?

A. Well, the contents were a brown powder, a small amount, possibly an ounce or two.

Q. What was it?

A. In the bottom of the can, examination showed it to contain a small per cent of calcium cyanide one and one-tenth per cent.

Q. Is that the cyanide used to make cyanide gas?

A. Yes, sir.

Q. Does the gas liberate itself freely?

A. From this material, yes, sir; from this material, exposed to the atmosphere, cyanide gas is liberated.

Q. So that if the can was obtained on the 16th of July, [fol. 49] 1927 and you analyzed it in April, 1928, the strength of it in April would not indicate the strength of it in July; it would have lost a lot of its strength?

A. It would have lost a great deal of the cyanide.

Mr. Carey: No cross examination.

WILLIAM J. DILLWORTH recalled.

Direct examination by Mr. Simpson:

Q. The superintendent has designated some of the employees as being house men; what is a house man?

A. House man? What they are? I know I had two men on the floor with me.

Q. What does the term "house man" mean?

A. I could not really tell you what it means.

Q. Was there any system of bells for you and for this man who is dead, Ambrose?

A. Any bells?

Q. Two bells for you and three for Ambrose; did you have any system of bells?

A. No, sir.

Q. Any bells used at all in that work?

A. Yes, sir.

Q. Who was it sounded the bells?

A. The man upstairs.
Q. Who were they?
A. There is one of them here.
Q. What is his name?
A. John Brewer.
Q. What did he sound the bells for?
A. To notify us to set a trolley or something like that.
Q. Was there any particular number of bells for a trolley?
A. No, sir.
Q. How many bells would he sound?
A. Probably two.
Q. What would two mean?
A. That would mean to answer the bell and go to the [fol. 50] speaking tube.
Q. See what he wanted?
A. Yes, sir.
Q. Was there three bells sounded?
A. No, sir.
Q. Only two bells always sounded?
A. Yes, sir.
Q. They were sounded by the weighers?
A. Yes, sir.
Q. What did the weigher do up above; what was his work?
A. Weigh the grain.
Q. And he would notify you when it was ready to go into the shoots?
A. Yes, sir.
Q. One thing I omitted to ask you about, when you came back how many covers were off these manholes?
A. Only one cover off the manhole and one spout hole. There is four covers in this one bin.
Q. Four on this one bin; what were they?
A. Three spout holes, one manhole, that is, larger hole.
Q. When you came up to the top of the bin, were they all off, or only two covers off?
A. Two, the manhole and the one covering the spout hole.
Q. The spout hole and the manhole cover?
A. Yes, sir.
Q. Would you have to take the spout hole cover off to put the spout on?
A. Yes, sir.

Q. How large was this hole that was open by the manhole cover?

A. I don't know really how large it was.

Q. Was it ten feet or not, ten feet circumference?

A. No, sir.

Mr. Carey: I can give you the measurements, if you want. The measurements which I have are 20 inches by 16¾ inches.

[fol. 51] Q. What was the purpose of that, to go down in the bin?

A. Yes, sir.

Q. There was a ladder led right from that?

A. Yes, sir.

Q. Down into the bin?

A. Yes, sir.

Cross-examination by Mr. Carey:

Q. I thought you testified you didn't know what became of this grain after it was put in the bin?

A. No, I don't know what became of it.

Q. You found one spout hole uncovered and the manhole uncovered when you got there after the accident?

A. Yes, that's right.

The Court: What is the size of the spout hole and the manhole?

The Witness: I don't know what size they are, to tell you the truth.

The Court: I don't mean in inches or feet, or anything of that kind; just as you saw them, did they look to be large?

The Witness: The manhole is a little bigger.

The Court: The manhole is a little bigger?

The Witness: That is square and the other hole is round.

The Witness: The manhole is square and the other cover is round?

The Witness: Yes, sir.

Mr. Carey: I have the diameter of the other holes, if counsel would like to have it stated.

Mr. Simpson: Yes.

Mr. Carey: The three circular holes were seventeen inches in diameter.

[fol. 52] JOHN T. BREWER sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?

A. Dumont, New Jersey.

Q. Are you employed on the Weehawken Grain elevator which has been under discussion here?

A. Yes, sir.

Q. Were you employed there on July 16th, 1927?

A. Yes, sir.

Q. How long had you been working there before that date?

A. Fourteen years.

Q. What was your duty there?

A. Shipping weigher.

Q. What did you actually do, physically do?

A. Weigh grain.

Q. You weighed grain, on what kind of scale?

A. 800 bushel Fairbanks scale, weighs automatically.

Q. After being put on there; then you weighed it, and what was the next thing you did?

A. Well, it is according to what I was going to do. If I was going to ship, I would have sent word to have a shipping bin ready; I would notify them to have a trolley there.

Q. What kind of bin?

A. Twelve thousand bushel bin.

Q. If you want to use that bin, what do you do, if you wanted to get the attention of the man on the floor where the top of the bin was; what would you do?

A. I would ring the bell.

Q. How many times?

A. Well, it makes no difference, two, three or four. If I wanted to get him quick maybe five or six.

Q. And somebody would speak to you through the tube?

A. Through the tube.

Q. Would only one person talk to you, or anybody on the [fol. 53] floor?

A. I used to call for the foreman of the floor.

Q. For no other one there?

A. The next man in charge.

Q. Who would that be?

A. I don't know. Maybe at the present time—I don't know who is down there.

Q. If the foreman wasn't there and Ambrose was there or the other man was there?

A. The nearest man.

Q. And he talked to you?

A. Yes, sir.

Q. What would you say to him?

A. Whatever I wanted.

Q. You would tell him what you wanted to do?

A. Whatever I wanted.

Mr. Carey: No questions.

RAYMOND A. PHELAN sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Where do you live?

A. 110 17th Street, West New York.

Q. Were you connected with the West New York Fire Department on July 16th, 1927?

A. Yes, sir.

Q. What was your position?

A. I am on Headquarters.

Q. As fireman?

A. Yes, sir.

Q. Did you go to this grain elevator at Weehawken on July 16th, 1927?

A. Yes, sir.

Q. About what time?

A. Around half-past ten or eleven o'clock; somewhere around there.

Q. Why did you go there?

A. Well, I believe the chief got a call.

Q. You didn't get the call?

A. No.

Q. You were asked by the acting Chief to go?

A. Yes, sir.

[fol. 54] Q. What did you take with you?

A. Well, we took two gas masks.

Q. Nothing else?

A. No, that's all.

Q. Who was it that asked you to take the gas masks?
A. The acting chief.
Q. What is his name?
A. Charles Danielson.
Q. When you got there, what did you find out about the elevator?
A. Well, there was a man down in the bin.
Q. Where did you go when you got to the elevator?
A. Up to the bin floor.
Q. That is where the top of the bin is?
A. Yes, sir.
Q. Did you look down in this bin 81?
A. No, sir; I just walked over to it and smelt.
Q. What was the condition there; was there any gas around?
A. There was an odor of gas and the doctor claimed it was a very dangerous gas.
Q. As a result of something the doctor said, you kept away?
A. Yes, I walked away.
Q. Then what was the next thing that was done?
A. Then Chief Danielson ordered me to go down in the bin, to don a gas mask and go down.
Q. Who asked you?
A. Charles Danielson.
Q. Ordered you to put a gas mask, and see if you could get the body?
A. Yes, sir.
Q. What did you do?
A. I put the gas mask on and they tied me up with a rope.
Q. Then what?
A. Then I adjusted the gas mask and started to go down.
Q. How far down did you get?
A. I got about ten rungs down, I guess.
Q. What happened when you got ten rungs down with the gas mask on?
A. Well, the air started to go away from me someway and it was getting impure.
[fol. 55] Q. What effect did it have on you?
A. Started to *me* me feel headaches and dizziness.
Q. What did you do then?

A. I got the rope and pulled on the rope and they pulled me up.

Q. So that you had the gas mask on then?

A. Yes, sir.

Q. You experienced these things you told us about and you didn't go down to get the body?

A. No.

Q. What was the next thing that happened?

A. Well, then I came up the ladder and took off the gas mask. I wanted to get some fresh air.

Q. What was the effect of all this stuff that you had been breathing?

A. Well, it made me dizzy and gave me headaches.

Q. Was this bin that you had this experience in the same one that the body was lying at the bottom of?

A. Yes, sir, that was the bin.

Q. How long was it before you came to after you got to the window?

Mr. Carey: I object to that; as to his coming to, I don't know there was any such testimony.

Q. Didn't you swear you went to the window because of the condition you felt yourself in?

A. Yes, I went over to the window to get some fresh air.

Q. How long were you at the window?

A. About five minutes.

Q. After you got the fresh air, did you feel all right?

A. Then I felt better.

Q. Then what did you do?

A. Well, then, we waited around there and then went downstairs.

Q. Then what was done downstairs to get the body out?

A. Well, they took four bolts out of the bottom of the [fol. 56] bin, that is the opening at the bottom of the bin where the grain runs out; they took them out, and took the slide away and they pushed the body up, and brought it out head first.

Q. Did the doctor work over the body?

A. Yes, sir.

Q. What did he work over the body for?

A. Well, he had something, I don't know what you call it, he put on the heart and I believe he injected some serum into the body.

Q. Then afterwards did he pronounce him dead?

A. Well, we went up then; we left there, right before he pronounced him dead.

Q. The body was there when you left?

A. Yes, sir.

Q. What kind of gas mask did you have on; where did you get it?

A. From the chief's car.

Q. Do you know what type it was?

A. No, sir; I do not.

Q. You don't know what make it was?

A. Yes—it is one of the new ones, that is the reason I don't know it.

Q. How did it go, did it just cover your face?

A. Covered my face up tight. It was tied in the back.

Q. Did you ever use this mask before?

A. Not that particular mask.

Q. Masks of the same type?

A. No, I used the army mask before.

Cross-examination by Mr. Carey:

Q. You went into the bin, didn't you?

A. Yes, sir.

Q. And after you got into the bin, you felt the effects of the gas?

A. Yes, sir.

Q. And did you smell gas before you went into the bin? [fol. 57] A. I didn't come that close. I smelled it a little bit as I stood away from the hole.

Q. How near did you get when you smelled it a little bit?

A. Well, about twelve inches away from the bin or so; I just stepped over and smelt.

Q. Up to that time you had not smelled any of the gas odor at all; up to the time you got within twelve inches of the bin and bent over?

A. No, sir.

Q. You had been there about how long when you went to the bin and bent over?

A. Just as soon as I got there, I walked right to the bin.

Q. As you were approaching the bin, you did not discover the odor of the gas?

A. Not to my knowledge, I didn't.

Q. When you went into the bin, how far did you get before you began to feel the effects of the gas?

A. About ten rungs, I guess; that is about ten feet I think. I think they are twelve inches apart.

Q. Then you began to feel the effects of the gas?

A. That is when I felt it. I hit the rope then to bring me up.

Q. You got down about ten feet before you began actually to feel the effects of the gas?

A. Yes, before it came through the mask.

Redirect examination by Mr. Simpson:

Q. Was there anything to see, or just the effect; you could not see any trace of the gas. I mean there was no white clouds or anything of that kind?

A. I didn't look; I just kept on going, because these rungs were slightly slippery; the grain makes them slippery.

Q. You were not watching as you went down the rungs?

A. Yes, sir.

[fol. 58] Q. You were going down the ladder rung by rung?

A. Yes, sir.

Q. And not watching for gas; you say it was slippery?

A. Yes, sir.

Christopher Devitt recalled:

Direct examination by Mr. Simpson:

Q. This gas, cyanide gas, when it is liberated, is it colorless or colorful?

A. Colorless gas.

Q. Is there any way of detecting it by sight at all?

A. No.

Q. How does it liberate itself; how is it liberated from this cyanide, what do they do to liberate it; put it in water or what?

A. Not necessarily; it is liberated by chemical reaction that takes place with the moisture that is in the air.

Q. What does the moisture do?

A. Coming in contact with the calcium cyanide, liberated this hydro cyanide gas.

Q. When it was liberated in this room, would there be any way of telling it was in the room; except the fact of beginning to feel bad, you could not see it?

A. No.

Q. It is invisible?

A. Only from its effect.

CHARLES DANIELSON sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. You were the acting Chief of the West New York Fire Department on July 26th, 1927?

A. Yes, sir.

Q. And you were called to the Weehawken Grain elevator?

A. Yes, sir.

Q. Do you know why you were called?

A. Yes; they called and asked me if I had any gas masks, [fol. 59] that they had a man in the tank. I answered back I would be right there.

Q. What time did you get down there?

A. About 10:15 I should judge.

Q. Fifteen after ten in the morning; how did you get down?

A. Drove down in the car as far as I could, that is, about to pier 11. I had to walk the rest of the way.

Q. Who did you take with you?

A. Fireman Phelan.

Q. What did you find when you got to the elevator?

A. They took me up to the bin floor, as they call it, up the elevator. I had the masks and a searchlight with me. They told me a man was down in the tank and I put on a mask myself and ran over to the tank, and I seen there was a man on the bottom of the tank. I went away and adjusted, or helped to adjust the mask on Fireman Phelan, and put him down the hole to see if it was possible to get the man out. He got down, I should judge about ten feet when he gave me the signal to pull him out.

Q. Did you see the condition of the fireman when you pulled him out?

A. I did. He says he felt sort of sick, dizzy like. I told him to go over to the open window, which he did.

Q. What was the next thing that was done about getting the body out?

A. Why, they decided, as far as I understood, to get him out from the bottom of the tank. They had a few men done some work around the bottom of the tank. I don't know exactly what they did.

Q. Did you go down there?

A. I was on the bottom floor.

Q. Did you see the doctor working on him?

A. Yes, sir.

[fol. 60] Q. How long?

A. As far as I should judge, at least five minutes that I stood there.

Q. It didn't do any good?

A. No, sir.

Q. Then you came away?

A. Yes, sir.

Q. These gas masks you used, what type are they?

A. The one I had on was what they call a Chavey.

Q. How long have you been familiar with their use?

A. I have been in the fire department over 13 years.

Q. Do they keep out gas usually?

A. Yes, sir.

Q. What was the one that the fireman used?

A. That was what we call the regular Army mask.

Q. They keep out gas, ordinary gas?

A. Yes, sir.

Q. Can you explain how it got through the gas mask?

A. No, sir; I could not.

Cross-examination by Mr. Carey:

Q. You don't know what effect these gas masks which you used could have on cyanide gas?

A. No, sir; I do not.

Q. You never had any experience with that gas?

A. No, sir.

Q. Where were you when you put the gas mask on first?

A. I should judge about 15 or 20 feet away from the top of the bin.

Q. Had you been nearer to that, to the top of the bin before you put the gas masks on?

A. No.

Q. Did you notice any odor where you were standing?

A. Yes, I did notice there was a gassy odor in the building.

[fol. 61] Mrs. Antonia Ambrose sworn for the plaintiff.

Direct examination by Mr. Simpson:

Q. Mrs. Ambrose, your husband was John Ambrose?

A. Yes, sir.

Q. How long had he worked at the Weehawken elevator?

A. About thirty years.

Q. How old was he when he died?

A. 63.

Q. How old are you?

A. 58.

Q. How many children did he leave?

A. Four.

Q. Will you give me the names and how old they are?

A. Joseph is 35; John is 26; William is 19; the girl is 22.

Q. They are all married?

A. The girl and Joseph.

Q. How much money did your husband make?

A. 23.50 a week.

Q. He was living home with you?

A. Yes, sir.

Q. And how many of the children?

A. John and William.

Q. Did he bring this money home to you every week; how much money did he give you every week?

A. He gave me all the money.

Q. What was his nationality, your husband, American or Swiss or German or what?

A. Austrian.

Cross-examination by Mr. Carey:

Q. Did he bring this money to you every week?

A. Yes, sir.

Q. Didn't he keep any for himself?
A. No, he gave it to me, every cent; he gave it to me.
Q. Did you give any back to him?
A. A little, only what he needs.
[fol. 62] Q. Did you give him money to buy his clothes with?
A. Buy clothes himself.
Q. Can you speak a little louder?
A. I can't because I have been sick.
Q. You say he bought his clothes himself?
A. It was in the house to buy clothes.
Q. He lived there, in the family, with you?
A. Yes, sir.

Mr. Simpson: I understand it is admitted by the defendant that on the date of this accident, the Railroad Company operated between Weehawken and other points without the State; that they had in this warehouse grain that had been transported from other States and would be transported from the grain elevator without the State.

Mr. Carey: We admit that. Also that there was grain in the elevator which would be transferred to other points in New Jersey and that some of the trains which were operated by the railroad were operated exclusively within the State of New Jersey.

Mr. Simpson: Do you claim that there was some grain in this elevator that came from the State of New Jersey?

Mr. Carey: No.

M. Simpson: Then the grain all came from outside?

(Plaintiff rests.)

Motion for Nonsuit

Mr. Carey: If your Honor please, I move for a nonsuit, upon the following grounds:

1. At the time and at the times of receiving the injuries resulting in the death of the plaintiff's intestate, he was not engaged in interstate commerce.

[fol. 63] 2. No negligence has been established against the defendant.

3. The negligence alleged in the complaint has not been established against the defendant.

4. At the time of receiving the injuries which resulted in the death of the plaintiff's intestate, he was not acting within the scope of his employment.

5. The injuries which resulted in the death of the plaintiff's intestate arose out of his own negligence.

6. The proximate cause of the death of the plaintiff's intestate was his negligence.

7. The injuries which resulted in the death of the plaintiff's intestate were received at a place where his duty to the defendant did not require him to go.

8. The injuries which resulted in the death of the plaintiff's intestate arose out of disobedience to the orders of the defendant.

9. The injuries to the plaintiff's intestate were recived at a place where he had been forbidden to go by the defendant.

The Court (after argument): Under the circumstances, the motion for a nonsuit will be refused, at least at this time; exception will be allowed the attorney for the defendant on all the points he raised.

Mr. Carey: Exception.

[fol. 64] JOHN BREWER recalled for the defendant.

Direct examination by Mr. Carey:

Q. On the morning of this accident, did you call Mr. Ambrose to do anything?

A. Saturday morning, no, sir.

Q. Did you call him or anybody else to open the bin or do anything in connection with bin 81?

A. No, sir.

Q. Do you know where this grain came from that was run through bin 81?

A. The part of the country, or the part of the elevator where it was shipped from?

Q. No, I mean from what part in the elevator?

A. From bin 208.

Q. What kind of a bin is that?

A. It is a storage bin.

Q. Now, where was this grain put after it was drawn off from bin 81?

A. Bin 81, was put into bin 94.

Q. Did this movement of grain which passed through bin 81 and which was treated with this preparation; did this movement from Tuesday morning to Friday afternoon have anything to do with the transportation of that grain to its point of destination?

A. No, sir.

Q. Or transportation anywheres else?

A. No, sir.

Q. What was the purpose of that movement?

A. For the Cyanide people to experiment and use the grain so that they could put their bugs into it and then experiment with the cyanide.

Q. Just for the purpose of experiment?

A. Experimental purposes.

Q. At whose request?

A. At the request of Mr. Shanahan the superintendent.

[fol. 65] Cross-examination by Mr. Simpson:

Q. How many weighers were working up there this morning with you?

A. The day the grain was put in, three and the Chief Weigher.

Q. Would they all talk through this tube down below?

A. To the main floor, yes, sir.

Q. Did they have anything to do with the bin floor?

A. To the bin floor or the bottom floor.

Q. What time did you get to work that morning?

A. Eight o'clock.

Q. Were you going to use this bin any more, this bin 81?

A. Not that I know of, unless we used it for some other stuff.

Q. I mean on the morning of the death of this man; you say there was four of you there?

A. The morning of the death of the man?

Q. Yes.
A. Nothing.
Q. What is the name of the others?
A. There was myself and three others.
Q. What were their name?
A. Walters and Gallagher.
Q. Were they under you or over you?
A Both graded the same.
Q If you had a message for downstairs and Dillworth was not there, who took the message?
A. Whoever I talked to, took the message.
Q. You have already told us that if you could not get the foreman, you would get one of the other men and tell him?
A. We said whatever we wanted to be done; maybe to have a trolley set to put the grain through.
Q. Had Ambrose often done that?
A. I don't know if he set any trolleys alone.
Q. Did you ever talk to Ambrose yourself?
A. Very seldom I would give him a message.
[fol. 66] Q. How many times did you give him orders?
A. I never gave him a message more than once.
Q. What orders did you give him?
A. Any orders that I gave, I would request him to do whatever I wanted; I would select the bin.
Q. You would telephone down, and you would give them the message; all you say you did was to telephone down?
A. No, sir.
Q. Did you give your orders to anybody that answered from that floor that day?
A. No, sir.
Q. What makes you remember so clearly that on the 16th of July, 1927, you did not give any orders on that day?
A. I gave no orders at all on the 16th of July.
Q. What makes you remember that?
A. Because I remember I was called downstairs that day. I just happened to be on the floor after weighing some cars.
Q. Where?
A. Out in the yard.
Q. Did the cars come right into your room?
A. They come in on the track floor.
Q. What is the track floor?
A. The bottom floor.

Q. That is your floor?
A. No, sir.
Q. How do they get through to you?
A. Through the elevator.
Q. Don't the cars go on the elevator?
A. No, they come to the bottom floor and they are weighed. Then it is sent to the bins. There are 268 storage bins and 23 shipping bins.
Q. 268 bins where grain was stored and 23 shipping bins?
A. Yes, sir.
Q. And this grain is assigned to these bins?
A. Yes, sir.

Redirect examination by Mr. Carey:

Q. As far as you know, did anyone from your floor call [fol. 67] for the opening of bin 81 on the morning of this accident?
A. No, sir; nobody.

Mr. Simpson: I move to strike that out, as far as he knows. That is negative and valueless, and I move that it be stricken out as incompetent.

Q. When you were there on that floor with the other weighers, who would usually call?
A. Whoever happened to be working on the job. Whoever has the order, maybe we run an order or run a trolley, whoever calls up the ground floor or calls up the floor below, and he selects the bin.
Q. Who selects the bin where the stuff is to be put?
A. The chief weigher.
Q. What does Mr. Shanahan have to do with that?
A. He has nothing to do with the storing of grain. That is all left to the Chief Weigher.
Q. And he has the selection of the bins? A. Yes, sir.

William J. Dillworth, recalled by defendant:

Direct examination by Mr. Carey:

Q. Mr. Dillworth, were you working on the bin floor from Tuesday afternoon when this grain was put in bin 81 to Saturday morning after the accident happened?

A. Yes, sir.

Q. There every day?

A. Yes, sir.

Q. During that time, were you affected in any way by gas on the bin floor?

A. No, sir; not until Saturday morning.

Q. How and under what circumstances were you affected?

A. When I looked into the bin. I was with Ambrose [fol. 68] down there and looked in the bin and I had a sort of headache.

Q. That was the only time you were affected by gas?

A. Yes, sir.

Q. Did you open bin 81 on the morning of the accident?

A. No, sir.

Q. Did you see anybody open it?

A. No, sir.

Q. Who else was working on that floor besides you and Ambrose?

A. Fitzpatrick.

Q. That is all the men who were working there that morning?

A. That is all; just three.

Q. Did you say anything to Ambrose about the character of the gas that had been used, or the character of the product that had been used in this experiment?

A. Yes, I told him it was poison.

Q. When did you tell him that?

A. That was Tuesday when they were putting it in.

Q. Did you say anything about it afterwards?

A. Well, now and then we would talk about it as we passed and got a smell of it.

Cross-examination by Mr. Simpson:

Q. There was no gas used on your floor?

A. The bin was on that floor.

Q. There was no gas on your floor?

A. Down some sixty feet.

Q. Down at the bottom of that bin?

A. Yes, sir.

Q. When was the last time you saw this man alive?

A. I judge about nine o'clock in the morning.

Q. Do you know what time it was?

A. I don't know the exact time.

Q. What time was it you heard the noise?

A. Between a quarter to ten and ten o'clock.

Q. So for three-quarters of an hour you had not seen him?

A. No, sir.

[fol. 69] Q. You were in the shanty?

A. Yes, sir.

Q. How did people get up to your floor?

A. By the elevator or by the stairway.

Q. So that there were two ways that you got in, by the stairs or by the elevator?

A. Yes, sir.

Q. You stayed in your shanty there until a quarter to ten o'clock; is that right?

A. Yes, sir.

Q. You say that when you wanted to look for the body, you began to get a headache; how did you look for the body?

A. When I looked down the hole.

Q. Did you stand up on the floor and look into the hole or did you go down the ladder?

A. I didn't go down the ladder; I stayed on the floor.

Q. You stayed on the floor and bent your head?

A. Yes, sir.

Q. Then you bent down and put your head over the hole?

A. Yes, sir.

Q. Then you smelt this smell?

A. Yes, sir.

Q. Were you trying to get the smell or trying to see the body?

A. I was trying to see the body.

Q. How far down did the ladder go, how many rungs down?

A. Maybe to four or five feet from the bottom of the bin.

Q. Was there any entrance to that bin except on your floor?

A. No, sir.

Redirect examination by Mr. Carey:

Q. Did you open that bin on Saturday morning?

A. No, sir.

Q. Did you drop a light in the bin that Saturday morning?

A. No, sir.

Q. Did anyone from the weighing floor call for bin 81 that morning?

A. No, sir.

[fol. 70] Recross-examination by Mr. Simpson:

Q. You said you didn't open the bin. These weighers say that when you were not there, they would give orders to the men. You say you are the only one to give orders to the men; do you know anything about that?

A. When I was on the floor; if I go downstairs for something——

Q. If you happened to go down stairs, who would they give orders to?

A. Whoever answered the bell.

JOHN E. FITZPATRICK recalled by defendant.

Direct examination by Mr. Carey:

Q. Did you work on the bin floor on Tuesday, Wednesday, Thursday, Friday and Saturday?

A. Yes, sir.

Q. With the man who was killed?

A. Yes, sir.

Q. Every day?

A. Yes, sir.

Q. Were you at any time affected by the gas from bin 81? A. No, sir.

Q. Did you open bin 81?

A. No, sir.

Q. Any of the covers on Saturday mornings?

A. No, sir.

Q. Did you see anybody opening any of the covers on bin 81?

A. No, sir.

Q. Did you drop a light into bin 81?

A. No, sir.

Q. Did you see anybody doing that?

A. No, sir.

Q. So far as you know, did anyone call, any one from the weighers' floor call for the opening of bin 81 on Saturday morning?

A. No, sir.

Q. No one said anything to you about opening it?

A. No, sir.

Cross-examination by Mr. Simpson:

Q. Did the weighers ever say anything to you about opening bins?

A. No, sir.

[fol. 71] Q. Never; you know that?

A. I only worked there two weeks.

Q. Were you there when the foreman was away downstairs and they called Ambrose to the tube and they told him to open a bin?

A. Not to my recollection.

Q. You say you didn't smell any gas there?

A. No, sir.

Q. You haven't any sense of smell?

A. No, sir.

Q. You didn't expect to smell any?

A. No, sir.

(Both sides rest.)

MOTION TO STRIKE

Mr. Carey: I now move to strike out the evidence in this case with respect to the can which was exhibited here and the contents thereof and the analyses, on the ground that it has not in any way been connected with the experiment which was performed in connection with this grain. Its connection with that is not established by any evidence whatever; and the fact that it was in the custody of a man who went there and got it on the morning of the accident, under the circumstances testified to, does not in any way connect it with the treatment of this grain which was used for the experiment in question.

The Court (after argument): Well, the chemists' testimony as to the properties of this kind of gas and the doctor's testimony as to this kind of gas being found in the

place, and the testimony relative to this kind of gas coming in contact with human beings, that will remain. Your motion is only with respect to such part as related to this particular can itself.

Mr. Carey: And the contents which are said to have been taken from it and analyzed by the chemist.

[fol. 72] The Court: Yes; that will be stricken out, with an exception to Mr. Simpson.

Mr. Simpson: Exception.

Mr. Carey: I now make a motion for a direction of verdict, on the same grounds urged in my motion for nonsuit.

The Court: The motion will be denied.

Mr. Carey: Exception.

The Court: You may have an exception.

(Counsel summed up to the jury.)

CHARGE TO JURY

The Court then charged the jury as follows:

The Court: Gentlemen of the jury: This is an action brought and being maintained by Antonia Ambrose, as Administratrix of the Estate of John Ambrose, Senior, deceased, against the New York Central Railroad Company, a corporation.

It is brought for the purpose of recovering damages under what we know as the "Death Act," for the death of John Ambrose, Senior.

The action is brought under what we commonly call in the law the "Federal Employers Liability Act." That part of the Act in question which may be of value or service to you is as follows: the Act provides

"Every common carrier by railroad engaged in interstate commerce,"

that is, commerce between the several States of the Union, and so forth,

"shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal

[fol. 73] representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

In actions of this character and in this action, gentlemen of the jury, there are several matters which require your attention and your determination upon the evidence as you find it, and under the law as it is applicable to the issues as raised in this case. I shall endeavor to give them to you in what appears to me to be the order in which you would naturally consider and determine them.

Therefore, you will understand that just because of the fact that I give them, or place before you the several issues in a certain order and in a certain manner, so far as one relates to the other, is no reason of course that you should consider them in that manner. If consideration of them in another order is more satisfactory to you, then it justifies your doing so. All that I can do is that which in my judgment best lays before you and most clearly lays before you the issues you have to determine.

First and foremost, it is necessary that the plaintiff shall establish and must have established by a fair preponderance of the evidence those facts and conditions which gave [fol. 74] her a right of action under the statute in question, because she is depending and maintaining her action entirely upon the right which she alleges her intestate, that is her husband, had and she in turn as his administratrix has, under this Federal Act.

Therefore, I say it is necessary and proper for you to determine whether or not the plaintiff has, by a fair preponderance of the evidence, established a right to the use of this Act in question.

Under this Act, that is the Federal Employers Liability Act, and in order to have the benefit of an action under this act, it must appear that the defendant Company at the time complained of was engaged in interstate commerce;

and it likewise is necessary that it appear by the same degree of evidence that the intestate himself was at the time of the occurrence complained of, engaged in interstate commerce. And unless both of these things appear, and are shown by the plaintiff by a fair preponderance of the evidence, this plaintiff has no right of action under the act in question.

So for that reason, I am first presenting that point to you for your consideration, because if you find that she has not established these things which she must establish in order to have the benefit of this statute, then of course you would not go any further, and your deliberations and the case must end there.

As I have suggested, the first and important question for your decision then, is whether or not the plaintiff has satisfied you by a fair preponderance of the evidence that at the time of the happening of this accident the defendant Company was engaged in interstate commerce from the facts which appear indisputably in this action. It is for you to [fol. 75] say whether or not they were so engaged at this time. So that brings you down, narrows down your inquiry to the question as to whether or not the husband of the plaintiff in this suit, at the time of the happening was engaged in interstate commerce. That is a situation also for you to determine from all the evidence in the case, as to just what the plaintiff's intestate was doing at the time of this accident.

Now, the question has been raised here and the contention is that this plaintiff's intestate at the time of this accident, was not engaged in his employer's duty at all, but that he was doing something which he had been forbidden to do, something which he had been warned against doing. You are to take that into consideration from all the facts and all the circumstances in this case, and you are to say if, at the time of the happening of the accident, the intestate was engaged in and about the duty which he owed to the master, the defendant Company, with respect to interstate commerce, or had he removed himself from that employment, had he taken himself out of that relation that had existed as between him and the defendant Railroad Company, so that he was not at the time of the happening in question engaged in any act which he was called upon, as the servant of the defendant Company, to perform in relation to and

with respect to the interstate commerce of the defendant Company.

Of course, Gentlemen, if you find the fact to be that this intestate had a direction or order that he should remain away from this particular place, specifically remain away, and that he was doing something which he had been specifically ordered not to do, then he would be outside the [fol. 76] scope of his employment and could not recover.

If you find, Gentlemen, that those facts which give to this woman as administratrix of her husband a right of action under the rules which I have given you, and under the evidence, have been established, your consideration of the issues does not stop there, because another question immediately presents itself to you, and that is, was the accident to the plaintiff's intestate, that is her husband, caused as the proximate result of any negligence on the part of the defendant Railroad Company, as charged by the plaintiff in her complaint.

So that, Gentlemen, you take up first of all, and you have got to find in this case that it is governed by this Act which we speak of as the Federal Employers Liability Act. If you find that, then you go to the next question: was this accident caused by the negligence of the defendant Company, and whether or not that negligence was the proximate cause of the accident.

Now, it was the duty of this defendant Company to use reasonable care to supply workmen who were working in its employ reasonably safe places for the employees to work, and then for you to say whether or not under all the circumstances, after having heard all of the evidence in the case, whether or not under the circumstances as you find them from the evidence in this case to have been on the day in question, this defendant Company complied with the duty which the law placed upon it, and did it use reasonable care to supply a safe place for the workman to be. And if they did not, if you find that they were negligent in doing that, then you come to the question of whether or not that negli- [fol. 77] gence was the proximate, that is the main, moving cause of this accident.

Now, Gentlemen of the Jury, if you find after applying the rule, that this defendant Company was negligent and that negligence was the proximate cause of the accident, and the cause of this injury and the death of this intestate,

then this plaintiff would be entitled to recover and you would come next to the question of the measure of damages.

There is another question which I am going to take up with you later, but I think it proper to put it after the question of damages, because it is a question which even if you find it to be present in the case, could only be used to minimize the measure of damages, and that is the question of contributory negligence.

You have heard in a great many cases during this last week, cases brought under the State Act, in negligence cases where the Court, where contributory negligence is alleged, has charged you that would bar a recovery. I call your attention now to the fact, so that you will not get confused, that under the act under which this case is being tried, contributory negligence is not an absolute bar to recovery, but it can only be taken into consideration in diminution of damages if you find it to exist at all. So I am leaving that to follow after the question of damages, because, as I said to you, if you find it to exist it cannot, as it does under the State law, absolutely defeat recovery, but can be used, if at all, only to diminish damages.

If this woman is entitled to a verdict, then it will be necessary for you to know for what she is entitled to recover. As I indicated to you at the opening, this is an action [fol. 78] brought under the Death Act. It is not necessary for me to read to you this statute, but let it suffice for me to say to you, that without that statute which I have indicated and called the Death Act, there could not be any recovery for death in the State of New Jersey prior to the passage of this Act. So you are to be guided and must be entirely guided, and explicitly guided, in the determination of the amount of any verdict, if there is to be one for the plaintiff, by what that act says a verdict may be had for; and I know, Gentlemen, that to what I am about to say to you, you will give your very best attention, because it is important that you should have this rule of the statute, as well as what our courts have said upon it, firmly impressed in your minds.

The statute says the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed between such widow and next of kin in the proportion pro-

vided by law in relation to the distribution of personal property left by persons dying intestate.

"In every such action the jury must give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person."

"What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss"—money loss—"which falls upon the widow and next of kin by the premature takin-off of the intestate" —that is, the husband and father in this case—"That fund is ascertained by taking into account all the possiblities. The intestate,"—that is, the husband and father, in this [fol. 79] case—"might have died by the course of nature shortly after the accident."

He might have become sick, incapacitated, unable to work any longer. The widow herself might have died shortly afterwards, the next of kin might all have died shortly afterwards.

"The damages are to be determined by reference to the pecuniary injury resulting to the widow and next of kin of the deceased by his death. The injury to be thus recovered for has been defined to be the deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is therefore, the sole measure of damages."

"Nothing is to be added for loss of society or wounded feelings, or anything else which can not be measured by money and satisfied by pecuniary recompense."

In other words, what the plaintiff says in this case is that; had not this casualty taken place, had not my husband been killed, that I would have been entitled during his lifetime and during my lifetime and during the lifetime of my children;—that in all reasonable probability he would have earned money, and in like probability, he would have contributed from his earnings to my support and to the benefit of the next of kin, that because of this accident, he met his death, and therefore his ability to earn and likewise his

ability to contribute to myself and to the next of kin, has been cut off.

That is what she asks and claims, and what the law says the widow and next of kin are entitled to have in such a situation is that sum of money which represents in reasonable probability those sums which the father, had he lived, [fol. 80] would during his lifetime, and that of the widow and the children, have contributed to their support and maintenance and for their benefit. Not the gross sum that you would find, if any, that he would have so contributed had he lived, and during their periods of life, but that gross sum that you would find, capitalized, as the courts have said, or reduced to its present worth, that lesser sum than the whole loss which is the present worth of the total loss; because you see, Gentlemen, the reason for that is this: that had the intestate continued to live and continued to earn, and continued to contribute to his wife and family, he would have earned week by week, or month by month, as the manner of payment of wages was, and he would naturally have contributed as he earned; so that had he lived during the lifetime of his widow and next of kin, whatever contributions, if any, were made by him, would have been made in those periodical payments or contributions running over the entire period when the contributions would have continued.

Now, by your verdict you are satisfying for all loss, both that which has accrued as well as that which in reasonable probability under the evidence would have accrued at this time; and, therefore, they should not have the total sum, but that lesser sum which is the present worth of the total loss.

Now, you will remember the testimony; that this man was 63 years of age; that his wife was 58 years of age. You will remember that at the time of his death he was making $23.50 a week.

You will take these things into consideration and determine as a capital fund, if you come to the question of damages and award any damages, what sum will represent the [fol. 81] present value of this loss to his widow and next of kin, taking into consideration his age, and the age of the widow, and the age of the children, and the amount of money which he was making at the time.

Now, gentlemen of the jury, I have given you the rule for the measurement of damages as if the plaintiff were entitled thereto without any deduction. But in this action, the defendant raises as one of its defenses the defense of contributory negligence. That is, the defendant says that even though you, gentlemen of the jury, find from the facts and under the law, that the intestate met his death as the proximate result of some negligence upon the part of the defendant company, yet the defendant says the intestate was himself guilty of negligence which contributed to the happening which caused his death. The burden of satisfying you of that, gentlemen of the jury, rests upon the defendant, because that is a defense urged by it, and it must satisfy you by a preponderance of the evidence of such facts as stated, that the intestate himself was guilty of negligence which contributed to the happening.

Now, there is a rule of law which applies and did apply to this intestate, and that is, that he was bound to use that care which a reasonably prudent person would or should have used and exercised, time, place and circumstances and conditions considered, so that he would not bring harm to himself. I have given you now the degree of care which the plaintiff's intestate was himself required to use.

Under this present Act, gentlemen of the jury, the law is to the effect that even though, under the provisions of this Act, it should appear that the employee himslef may [fol. 82] have been guilty of contributory negligence, that shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Now, I think, gentlemen of the jury, that practically covers the situation as I find it.

First of all, the plaintiff in this case says that through the negligence of this defendant, the plaintiff's intestate met his death. The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence, in order to have a recovery, first, that both employee and employer were at the time of the accident employed in interstate commerce, in order to bring it under this Act. If they are engaged in interstate commerce, then the plaintiff must satisfy you by a preponderance of the evidence that the accident was caused through the negligence of the defend-

ant, and that that negligence was the proximate cause of the injury.

Now, if they have done that, then the plaintiff is entitled to a recovery, and entitled to recover in such sum as I have outlined to you that this Act provides. There is no provision here for sympathy, or for sorrow, or for loss of society, but it is for just exactly as I have described it to you, under the Act itself.

The defendant sets up in this case an absolute denial of any liability, because they say they were not negligent. If that is so, there is no recovery, because that is an absolute defense. The defendant further says that at the time the plaintiff's intestate was not engaged in interstate commerce. If you find that, there would be no recovery under the Act under which this suit is brought.

The defendant further says that at the time of the ac- [fol. 83] cident that the plaintiff's intestate was doing something which he had been forbidden to do, and which was outside of the scope of his employment. If you find that to be so, there would be no recovery because she, the plaintiff, could not then recover under the provisions of this Act.

The defendant further says, that even if it was negligent, and that negligence was the proximate cause of the accident, nevertheless the intestate himself, the husband of the woman bringing this suit, was guilty of contributory negligence. If you find that to be so, you are to diminish the amount of your verdict by such proportion as you find that the plaintiff's intestate's contributory negligence bears to the negligence of the defendant.

I think that practically covers the whole case as I recall it.

I have been requested by the defendant to charge a number of requests.

DEFENDANT'S REQUESTED INSTRUCTIONS

1. If at the time of receiving the injuries resulting in the death of plaintiff's intestate, he was not engaged in interstate commerce, plaintiff cannot recover. I so charge you.

2. Unless some definite act of negligence alleged in the complaint has been established against the defendant, plaintiff cannot recover. I so charge you.

3. If the proximate cause of the death of plaintiff's intestate was his negligence, plaintiff cannot recover. I so charge you.

4. I refuse to charge except as already charged.

5. I refuse to charge except as already charged.

6. I refuse to charge except as already charged.

[fol. 84] 7. Whether plaintiff's intestate was engaged in interstate commerce depends upon what he was doing at the time of the accident. I so charge you.

You may take the case and retire.

(Jury retired.)

Mr. Carey: I except to your Honor's submitting to the jury the question of negligence on the part of the defendant.

Also, I except to the submission to the jury of the question of the plaintiff's intestate having been engaged in interstate commerce at the time of the injury complained of.

Also, an exception to the refusal of the Court to charge the requests refused except as the Court charges in its general charge.

The Court: You may have exceptions.

DEFENDANT'S REQUESTS NOT CHARGED

1. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover.

5. If the injuries which resulted in the death of plaintiff's intestate arose out of disobedience to the orders of defendant, plaintiff cannot recover.

6. If the injuries to plaintiff's intestate were received at a place where he had been forbidden to go by defendant, plaintiff cannot recover.

[fol. 85] In Circuit Court of Hudson County

Action at Law

Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., Deceased, Plaintiff,

v.

New York Central Railroad Co., Defendant

Rule for Final Judgment—Filed May 11, 1928

This case was tried before Hon. Frank L. Cleary, Judge, and a jury, at the Hudson County Circuit Court, on May 10, 1928.

Evidence having been adduced by both parties hereto, the jury considered same, and returned a verdict in favor of the plaintiff, Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, and against the defendant New York Central Railroad Company, a corporation, and assessed the damages in the sum of Six Thousand and Three Hundred ($6,300.00) Dollars.

It is therefore ordered and adjudged that the plaintiff Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, have and recover from the defendant New York Central Railroad Company, a corporation, the sum of Six Thousand Three Hundred ($6,300.00) Dollars, together with costs, and, it is further ordered and adjudged that judgment final be, and is hereby entered, in favor of the plaintiff Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, and against the [fol. 86] New York Central Railroad Company, a corporation.

Frank L. Cleary, Judge.

In Circuit Court of Hudson County

Judgment

Judgment on Verdict in the above entitled cause was entered in this Court on the 11th day of May in the year of

our Lord One Thousand Nine Hundred and Twenty-eight, in favor of the Plaintiff Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., deceased, and against the defendant New York Central Railroad Company, a corporation, in a plea of Action at Law, for the sum of Six Thousand Three Hundred ($6,300.00) Dollars, and costs to be taxed.

Judgment entered and signed this 11th day of May, 1928.
John J. McGovern, Clerk.

[fol. 87] In Circuit Court of Hudson County

[Title omitted]

Rule to Show Cause—Filed May 15, 1928

Application having been made for this rule within six days after the rendering of the verdict herein,

It is, on this 14th day of May, 1928, ordered that the plaintiff herein show cause before this Court on the 25th day of May, 1928, at ten o'clock in the forenoon (daylight saving time) at the Court House in Jersey City, why the verdict herein should not be set aside and a new trial granted on the ground that said verdict is excessive.

And it is further ordered that all objections noted at the trial on behalf of the defendant be and the same hereby are reserved as grounds of appeal.

Frank L. Cleary, Circuit Court Judge.

[fol. 88] In Circuit Court of Hudson County

[Title omitted]

Extension of Time for Filing Recognizance on Appeal—Filed May 28, 1928

Judgment having been entered in the above entitled cause on May 11th, 1928, in favor of the plaintiff and against the defendant herein for the sum of $6,300, besides costs, and

defendant having taken a rule to show cause why the verdict herein should not be set aside on the ground that the same is excessive, and the time for entering into and filing a recognizance to stay execution on said judgment in case of an appeal therefrom being about to expire.

It is on this 25th day of May, 1928, Ordered that the time for filing recognizance by and on behalf of defendant to stay execution in case an appeal shall be taken from said judgment, be and the same is hereby extended to June 4th, 1928, and proceedings by way of execution on said judgment is hereby stayed until that date.

Frank L. Cleary, Circuit Court Judge.

[fol. 89] In Circuit Court of Hudson County

[Title omitted]

Extension of Time for Filing Recognizance on Appeal—Filed June 4, 1928

Defendant's rule to show cause not having yet been disposed of,

It is on this 4th day of June, 1928, ordered that the time for filing recognizance by and on behalf of defendant to stay execution in case an appeal should be taken from said judgment be and the same is hereby extended to June 9th, 1928, and proceedings by way of execution on said judgment are hereby stayed until that day.

Frank L. Cleary, Circuit Court Judge.

[fol. 90] In Circuit Court of Hudson County

[Title omitted]

Order Discharging Rule to Show Cause—Filed June 8, 1928

A rule to show cause having been entered in this cause on the 14th day of May, 1928, and this cause having been argued by Alexander Simpson, Counsel for the Plaintiff,

and Wall, Haight, Carey & Hartpence, Counsels for the Defendant, and the Court having considered the same and finding no cause for making the rule absolute.

It is thereupon, on this 8th day of June, 1928, on motion of Alexander Simpson, Ordered, that the said rule to show cause be and the same is hereby dismissed with costs, and the judgment is hereby confirmed.

Frank L. Cleary, Judge.

[fol. 91] In Circuit Court of Hudson County

[Title omitted]

Notice of Appeal—Filed May 15, 1928

To Alexander Simpson, Esq., Attorney for Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in the Circuit Court of Hudson County in the above stated cause.

Dated June 8, 1928.

Wall, Haight, Carey & Hartpence, Attorneys for Defendant.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 8th day of June, 1928.

Alex Simpson, Attorney for Plaintiff.

[fol. 92] In Circuit Court of Hudson County

Recognizance—Filed June 8, 1928

Recognizance on appeal in this action in the sum of $12,800, duly entered into before George G. Tennant, Supreme Court Commissioner, by the defendant-appellant, New York Central Railroad Company, as Principal, and National Surety Company, as Surety, in favor of the plaintiff-respondent, was filed herein June 8, 1928.

In Court of Errors and Appeals of New Jersey

Action at Law

Antonia Ambrose, Administratrix, etc., of John Ambrose, Deceased, Plaintiff-Respondent,

v.

New York Central Railroad Company, a Corporation, Defendant-Appellant

Grounds of Appeal—Filed June 29, 1928

The appellant states the following grounds of appeal:

1. The Court overruled the following question to the witness William J. Dillworth:

"Q. Was there any reason at all for his going into that bin?"

2. The Court overruled defendant's motion for judgment of nonsuit.

[fol. 93] 3. The Court overruled defendant's motion to direct a verdict in its favor.

4. The Court erroneously charged the jury as follows:

"As I have suggested, the first and important question for your decision then, is whether or not the plaintiff has satisfied you by a fair preponderance of the evidence that at the time of the happening of this accident the defendant company was engaged in interstate commerce from the facts which appear indisputably in this action. It is for you to say whether or not they were so engaged at this time. So that brings you down, narrows down your inquiry to the question as to whether or not the husband of the plaintiff in this suit, at the time of the happening was engaged in interstate commerce. That is a situation also for you to determine from all the evidence in the case as to just what the plaintiff's intestate was doing at the time of this accident."

5. The Court erroneously charged the jury as follows:

"Now, Gentlemen of the Jury, if you find after applying the rule, that this defendant Company was negligent and

Exhibit P-2

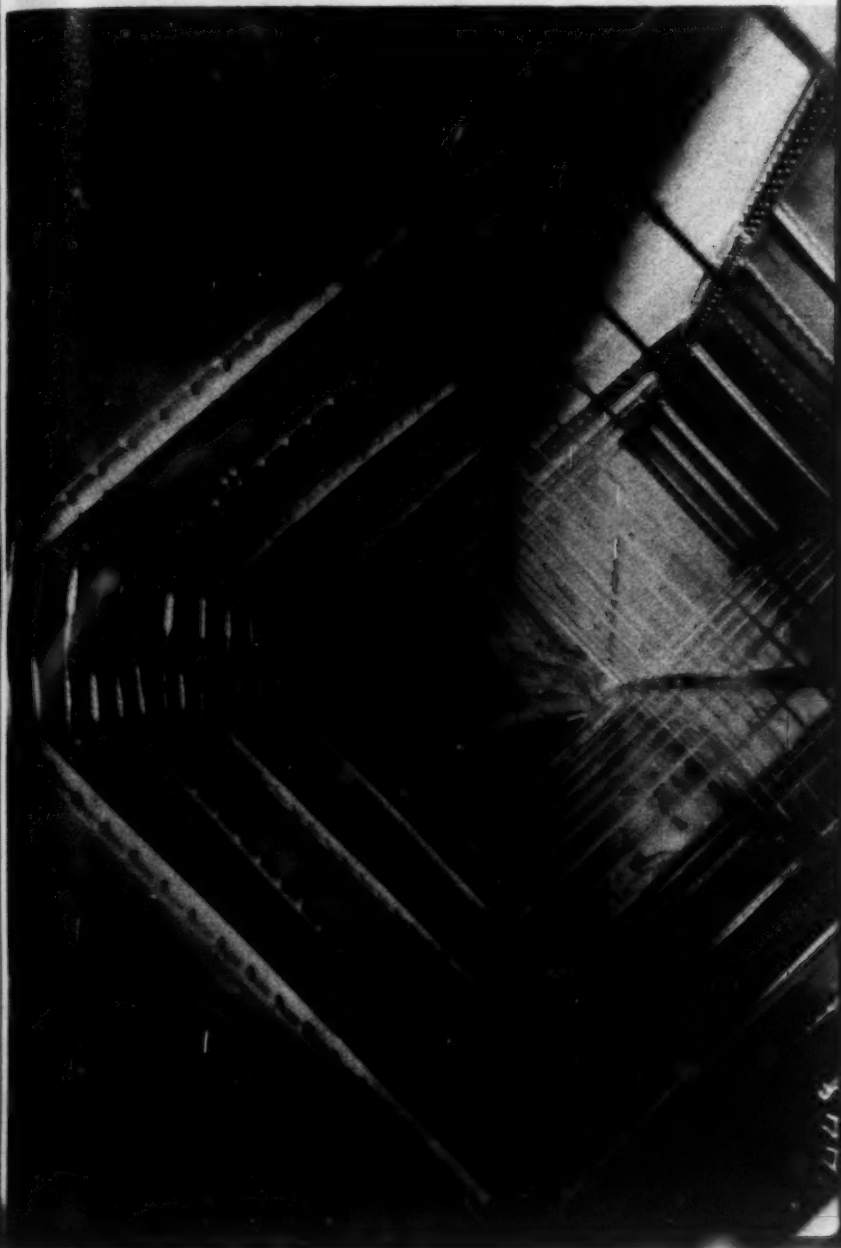

Exhibit P-3.

that negligence was the proximate cause of the accident, and the cause of his injury and the death of this intestate, then this plaintiff would be entitled to recover and you would come next to the question of the measure of damages."

6. The Court refused defendant's request to charge the jury as follows:

[fol. 94] "4. If the injuries which resulted in the death of plaintiff's intestate were received at a place where his duty to defendant did not require him to go, plaintiff cannot recover."

7. The Court refused defendant's request to charge the jury as follows:

"5. If the injuries which resulted in the death of plaintiff's intestate arose out of disobedience to the orders of defendant, plaintiff cannot recover."

8. The Court refused defendant's request to charge the jury as follows:

"6. If the injuries to plaintiff's intestate were received at a place where he had been forbidden to go by defendant, plaintiff cannot recover."

Wall, Haight, Carey & Hartpence, Attorneys for Defendant-Appellant.

(Here follow Exhibits P-2 and P-3, side folio pages 95 & 96 and 97 & 98)

[fol. 99] In Court of Errors and Appeals of New Jersey, October Term, 1928

No. 85

Antonia Ambrose, Administratrix of the Estate of John Ambrose, Sr., Deceased, Plaintiff-Respondent,

v.

New York Central Railroad Company, Defendant-Appellant

Appeal from Hudson County Circuit Court

Opinion—Filed Feb. 4, 1929

The Judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division, which renders any opinion by the Court impossible.

For defendant-appellant, Wall, Haight, Carey & Hartpence.

For plaintiff-respondent, Alexander Simpson.

This was a suit in the Hudson County Circuit Court in an action at law to recover damages for the death of the plaintiff's decedent, which was caused by the happening of an accident. Plaintiff had judgment, and defendant appeals to this Court.

Per Curiam:

The judgment under review herein is affirmed by an equally divided Court.

[File endorsement omitted.]

[fol. 100] Form C-248. Doc. No. 8024

IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

No. 85 of October Term, 1928

[Title omitted]

VOTE OF THE COURT—Filed Feb. 4, 1929

Date, Feb. 4, 1929.

The Chancellor presiding.
No opinion.

Check list	Affirm	Reverse
The Chancellor	..	1
" Chief Justice	..	1
Mr. Justice Trenchard	1	..
" " Parker	..	1
" " Katzenbach	1	..
" " Campbell	..	1
" " Lloyd	1	..
Judge Van Buskirk	1	..
" McGlennon	1	..
" Kays	..	1
" Hetfield	..	1
" Dear	1	..
Totals	6	6

[File endorsement omitted.]

[fol. 101] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

ANTONIA AMBROSE, Administratrix, etc., of John Ambrose, Deceased, Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, Defendant-Appellant

On Appeal from Hudson County Circuit Court

ORDER ON AFFIRMANCE OF JUDGMENT—Filed Feb. 4, 1929

This cause having been duly argued at the October Term, 1928, of this Court by Alexander Simpson, of counsel for

the respondent, and Wall, Haight, Carey & Hartpence, of counsel for the appellant, and the Court having considered the same, and finding no error in the record or proceedings in the Hudson County Circuit Court,

It is thereupon, on this fourth day of February in the year of our Lord one thousand nine hundred and twenty-nine, ordered and adjudged that the judgment of the Hudson County Circuit Court, in this cause, be affirmed with costs; and that the record be remitted to the Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Alex. Simpson.

A true copy. Joseph F. S. Fitzpatrick, Clerk.

[File endorsement omitted.]

[fol. 102] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 27, 1929

The petition herein for a writ of certiorari to the Circuit Court of Hudson County, State of New Jersey, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,172. New Jersey Circuit Court of Hudson County. Term No. 73. New York Central Railroad Company, petitioner, vs. Antonia Ambrose, as administratrix of the estate of John Ambrose, deceased. Petition for writ of certiorari and exhibit thereto. Filed April 29th, 1929. File No. 34,172.